Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD
AND LARRY J. BROUSSARD,
Petitioners.

VERSUS

VERMILION CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petition by Norman Vaughn, Freddie Broussard and Larry J. Broussard

JOHN K. HILL, JR.
MOUTON, ROY, CARMOUCHE,
BIVINS & HILL
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COUNSEL FOR PETITIONERS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petition by Norman Vaughn, Freddie Broussard and Larry J. Broussard

Petitioners, Norman Vaughn, Freddie Broussard and Larry Broussard, all major domiciliaries of Pecan Island, Vermilion Parish, Louisiana, petition the Court for the issuance of a Writ of Certiorari to the Supreme Court of Louisiana for the following reasons:

I.

REPORTS, OPINIONS AND JUDGMENTS OF COURTS BELOW

This case commenced via the Respondent's filing of the suits styled "Vermilion Corporation vs. Norman Vaughn," "Vermilion Corporation vs. Freddie Broussard," and "Vermilion Corporation vs. Larry Broussard," Docket Numbers 35948, 36982 and 36983, respectively, of the 15th Judicial District Court for Vermilion Parish, Louisiana, on November 7, 1975, October 12, 1976, and October 12, 1976, respectively. The three cases were consolidated by order of the Trial Court.

Vermilion Corporation moved for Summary Judgment in all cases, which Motions were granted by Judge Allen Babineaux on June 22, 1977.[1/]

These Summary Judgments were appealed to the Court of Appeal, Third Circuit, State of Louisiana, and the affirmance by that Court of Judge Babineaux' decisions is reported at 356 So.2d 551, La. App. 3rd Cir., 1978 (See 4/27/78 Southern Reporter Advance Sheet).[2/]

Petitioners applied for Writs of Review to the Supreme Court of Louisiana to examine the affirmance by the Court of Appeal. Denial of writs by the Louisiana Supreme Court is reported at 357 So.2d 558.[3/]

1/ The "Minute Entry" is Exhibit A-1, and the formal judgment, Exhibit A-2, of the Appendix.

2/ The Court of Appeal opinion is Appendix Exhibit A-3.

3/ Exhibit A-4 is the Denial of Writs.

Respondent's suits against all Petitioners asked for injunctions against Petitioners' alleged "trespassing" [4/] in Respondent's navigable canals, and further asked for damages. The Trial Court action, and its affirmance by the higher Louisiana Courts, granted and maintained the injunction.

Respondent, a leaseholding and management arm of Exxon, claimed that its artificial canals, which are similar to many other such canals throughout the Louisiana wetlands, are its private property, and that it has the absolute right to prohibit public use thereof.

The Louisiana Courts agreed with Respondent, despite the parties' agreement that these canals are navigable in fact, subject to tidal fluctuation, and have openings to the sea. The canals were built with private funds on privately owned land.

4/ Petitioners supplemented their incomes by shrimping in these canals.

II.

GROUNDS FOR INVOCATION OF JURISDICTION

(A) The Supreme Court of Louisiana denied Petitioners' Application for Writs of Review to the Court of Appeal, Third Circuit, State of Louisiana, on March 27, 1978. The Louisiana Supreme Court is the highest Court of that state, and its denial of Petitioners' application was and is a final judgment as contemplated by 28 U.S.C. 1257. Under Louisiana Law, no application for rehearing may be filed as to a denial of an application for writ of review to the Louisiana Supreme Court [See Rule IX, Section 6, "Rules of the Supreme Court of Louisiana," adopted August 31, 1974, effective January 1, 1974, Volume 8, West's Louisiana Statutes Annotated - Revised Statutes].

(B) Jurisdiction of this Court to review that Louisiana Supreme Court decision is conferred by 28 U.S.C. 1257 [3], as Petitioners here claim rights and privileges under the Constitution and Laws of the United States, primarily Article 1, Section 8, Clause 3, of the Constitution, and 33 U.S.C. 403.

III.

QUESTIONS PRESENTED FOR REVIEW

(1) If a private citizen on its privately held real property and with its private funds creates a system of artificial navigable waterways, in part via diversion, use and/or destruction of a pre-existing natural navigable waterway which flowed through that property, does the artificially developed waterway system, which is connected to other interstate navigable waters and to the sea, thereby become part of the "navigable waters of the United States," subject to a "navigation servitude" in favor of all citizens of the United States?

(2) Are channels built on private property and with private funds, which thereby are made to join with admitted and pre-existing tidal and other navigable waterways, and which are themselves navigable in fact and tidal, "navigable waters of the United States," burdened with a "navigation servitude" in favor of the public?

IV.

INVOLVED PROVISIONS OF LAW

(1) Article 1, Section 8, Clause 3, Constitution of the United States:

> "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States. . . ."

(2) 33 U.S.C. 403, which reads, in part, as follows:

> "The creation of any obstructions not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited. . . ."

V.

STATEMENT OF THE CASE

A. CLAIMS, DEFENSE AND PROCEEDINGS

Vermilion Corporation, Lessee from Exxon Company, U.S.A., of a large portion of the Louisiana wetlands in Vermilion Parish circa the Village of Pecan Island [including lands from the Gulf Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre Canal on the East to Rollover Bayou on the West] brought suit in the 15th Judicial District Court for Vermilion Parish, Louisiana, against Petitioners, Vaughn, Broussard and Broussard, alleging that Petitioners had "trespassed" on the leasehold via their navigation on and shrimping in Respondent's artificial canal system. This canal system was built by Respondent's predecessors in title on the leasehold.

Petitioners answered those suits, pleading that these canals are "navigable waters of the United States," subject to a paramount right of use for and on behalf of the public. Petitioners furthermore alleged that respondent's mere act of filing suit against them for "trespass" constituted an attempt by the Vermilion Corporation to obstruct the "navigable capacity of the navigable waters of the United States," all in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States and of 33 U.S.C. 403.

Attached hereto are copies of the petitions of Vermilion Corporation against Petitioners in all three State Trial Court suits, shown in the Appendix as Exhibit B in globo. Also attached are copies of the answers of all Petitioners in these suits (Exhibit C), in which answers the federal constitutional and statutory defenses were raised.

The case thus presented in the Trial Court a clash between an alleged right of private dominion and control over waterways versus a claim by Petitioners as citizens and members of the public of a right of use of those waterways.

Vermilion Corporation filed a Motion for Summary Judgment in the State Trial Court. In reasons of June 7, 1977, the Honorable Trial Judge, Allen Babineaux, granted the Summary Judgment, holding in effect that the canals on the leasehold are private, privately owned, and subject to private control.

On June 22, 1977, the same date upon which Judge Babineaux signed the formal judgment in favor of the Vermilion Corporation, petitioners obtained an order of appeal, and their appeal to the Court of Appeal, Third Circuit, State of Louisiana, was timely perfected.

The case was briefed and argued in the Court of Appeal and on February 6, 1978, by Judge Jerome Domengeaux, that court rendered its decision affirming Judge Babineaux' granting of Respondent's Motion for Summary Judgment in all three cases. Copies of all briefs of all parties in the Court of Appeal appear in the Appendix as Exhibit D in globo.

Petitioners applied directly to the Louisiana Supreme Court for the issuance of writ of certiorari of review seeking reversal of the judgments of the Trial Court and of the Court of Appeal, Third Circuit. The Louisiana Supreme Court denied this application on March 27, 1978, and this Petition for Certiorari seeks review of that denial.

B. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

The ancestors in title of the Vermilion Corporation at various times since 1940 built with private funds on their privately owned lands in Vermilion Parish, Louisiana, canals which generally speaking are 60 feet in width by 8 feet in depth.

The canal system formed thereby is entirely unitary in that no part of it is sealed or separate from any other part. Furthermore, these canals, from their beginnings on or near the South Side of Pecan Island, Louisiana, flow southerly through the Louisiana marshlands a few miles into the Gulf of Mexico, and the canal system otherwise connects with Fresh Water Bayou Canal and the Gulf Intracoastal Waterway, which are clearly "navigable waters of the United States," subject to a navigation servitude.

The parties agree that this entire artificial canal system, which is most often referred to by the residents of the area as the "Humble Canal," is subject to tidal fluctuation, and is navigable in fact.

In the Trial Court, Vermilion Corporation, via its Motion for Summay Judgment, admitted the truth of almost all of the Petitioners' factual allegations, which Petitioners believe supported their claim that the Humble Canal is navigable in fact, navigable in law, is in interstate commerce, and thus is part of the "navigable waters of the United States", not subject to private dominion and control.

The only factual allegation made by Petitioners which Vermillion Corporation disputed in the Courts below was that, in building this artificial canal system, Respondent's ancestors in title had used, impaired, and finally destroyed the factual navigability of certain natural navigable waterways which

formerly existed in the area on and across which the Humble Canal now flows.

Specifically, at all times in this litigation, Petitioners have alleged that the old Fresh Water Bayou, on and prior to the time of the development of the artificial "Humble Canal," existed in a natural state, flowed from a point North of Pecan Island, southerly to the Gulf of Mexico, and was a natural and actual marine highway of commerce for the citizens of the Pecan Island area. Indeed, it was the contention of Petitioners in all Courts below that old Fresh Water Bayou had been used prior to the development of the artificial "Humble Canal" to transport cattle, groceries, human beings and the United States Mail to and from the Pecan Island area.

Most important, Petitioners alleged and swore to in affidavits filed in opposition to the Motion for Summary Judgment in the Trial Court, that those natural navigable waterways [particularly Fresh Water Bayou] became unusable as such only when the Vermilion Corporation's ancestors in title built their artificial navigable waterways in the area.

In short, Petitioners claimed that natural navigable waterways, once used as such, were impaired and destroyed by the artificial creations of a private corporate developer, and it is this assertion which was and is in vehement dispute between the parties.

All Courts below held in effect that, even assuming all facts alleged by Petitioners to be true, Petitioners' claims of rights and privileges under the Constitution and laws of the United States are of no moment, as the State of Louisiana views privately developed canals on private lands to be private property, despite their navigability, despite their connection with other maritime highways of commerce, and despite their possibly having destroyed via their creation a pre-existing natural navigable waterway system.

The federal questions in this matter were raised in Articles 3, 15 and 16 of the Petitioners' answers to the suits in the Trial Court, and were raised factually in their affidavit filed in opposition to the Respondent's Motion for Summary Judgment in the Trial Court.

These questions were furthermore maintained and reurged in all proceedings and courts to which this case was addressed following the Trial Court's decision. Copies of the Petitioners' affidavit and of their brief in support of their Petition for a Writ of Review to the Supreme Court of Louisiana are attached as Exhibits E and F.

VI.

ARGUMENT

QUESTION 1

IF A PRIVATE CITIZEN ON ITS PRIVATELY HELD REAL PROPERTY AND WITH ITS PRIVATE FUNDS CREATES A SYSTEM OF ARTIFICIAL NAVIGABLE WATERWAYS, IN PART VIA DIVERSION, USE AND/OR DESTRUCTION OF A PRE-EXISTING NATURAL NAVIGABLE WATERWAY WHICH FLOWED THROUGH THAT PROPERTY, DOES THE ARTIFICIALLY DEVELOPED WATERWAY SYSTEM, WHICH IS CONNECTED TO OTHER INTERSTATE WATERS AND TO THE SEA, THEREBY BECOME PART OF THE "NAVIGABLE WATERS OF THE UNITED STATES," SUBJECT TO A "NAVIGATION SERVITUDE" IN FAVOR OF ALL CITIZENS OF THE UNITED STATES?

The Louisiana wetlands are crossed with many artificial canals. The private developers of those canals would be shocked if one were to suggest that these streams are "navigable waters of the United States," subject to a public right of navigation. But it would also be a great shock to the members of the public who regularly exercise that right of navigation via fishing, shrimping, and traveling on these canals to be told that these waters are "private property."

The reason both groups would be so shocked is that there simply has not been a lot of thinking by Louisianians devoted to the resolution of this clash of interests. With some exceptions, they have largely co-existed – neither has bothered the other much of the time, while both have felt virtually all of

the time that either could tell the other where to get off at any time.

Louisiana's view of this matter is best seen in *Audubon Society v. White*, 202 So.2d 660, La. App. 3rd Cir., 1974, which stands for a proposition which Petitioners believe cannot be countenanced under the Constitution and laws of the United States. Audubon holds that a waterway can be "navigable," and presumably may be part of the "navigable waters of the United States," but if it was built on private properly with private funds, is subject to private dominion and control.

Petitioners believe that there are no private "navigable waters of the United States" in general, and that the "Humble Canal" in particular is not subject to private control, for the following reasons:

Article 1, Section 8, Clause 3 of the Constitution gives to the United States jurisdiction of the surface of "navigable waters of the United States." *Martin v. Waddell's Lessee*, 41 U.S. 367, 10 L.Ed. 997 [1842]. See also *Harmon v. Chicago*, 147 U.S. 411, 15 S.Ct. 306, 37 L.Ed. 216, 1893.

"Navigable waters of the United States" are not subject to private dominion and control, and the public has a servitude of navigation thereon:

> "The concept of 'navigable waters' grew out of the 'public common of piscary,' i.e., the right of the common people of England to travel upon the waters and to fish them.
>
> * * *
>
> "The term 'navigability' has many legally distinct applications. [1] It may determine title to river and

lake beds. [2] It has been the touchstone of congressional jurisdiction over waters via the Commerce Clause. [3] It embodies the navigation servitude, a modern declaration of the common law right of access of waters. In addition [4] Admiralty jurisdiction in federal courts flows from the general concept of navigability."

United States v. Kaiser-Aetna, 408 F.Supp. 42, 48-49, D.C., Hawaii 1976.

If Vaughn, Broussard and Broussard had been allowed in the State Trial Court to proceed on the merits, they would have defended the Vermilion Corporation's action for trespass via, inter alis, attempting to prove as a fact the "navigability" of Fresh Water Bayou and other natural waterways in the Pecan Island area prior to the development of the Humble Canal system.

In so proving, Petitoners would have shown that prior to the development of the artificial canal system, there was a network of natural "navigable waters of the United States" in the area, subject to a "navigation servitude" in favor of the public, as they would have shown that there existed bodies of water suitable for use for transportation and commerce, which could have been made even more suitable therefor by reasonable improvements, which were actually used for both private and commercial navigable purposes, which were subject to tidal fluctuation, and which opened to and provided access to the open sea. See the various criteria for determination of status as "navigable waters of the United States" in *United States v. Stoeco Homes*, 498 F.2d 610, 3rd Cir. 1974 and *United States v. Moretti*, 478 F.2d 428, 5th Cir., 1973.

In *United States v. Kaiser-Aetna, supra*, it was claimed that Kuapa Pond, prior to artificial development which enlarged it

and which opened it to the ocean, was part of the "navigable waters of the United States," burdened with a "navigation servitude." Although the particular factual and legal background of Hawaiian tidal ponds dictated a result in that case irrelevant to the instant matter, a particular portion of the opinion of the Hawaii District Court shows exactly why proof in Petitioners' case of pre-existing navigable status of Fresh Water Bayou, et al, would have dictated ultimately a ruling against the Vermilion Corporation and in favor of Petitioners on the core questions of this lawsuit:

"If Kuapa Pond was navigable water of the United States prior to its development by defendants, such development would not have destroyed that status, absent a specific congressional abandonment of the waters, and the marina would unquestionably be subject to the public's right of access. See *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124, 41 S.Ct. 409, 65 L.Ed. 847, [1921]."

Supra, Page 49.

Furthermore, if via building of an artificial navigable waterway system in the Pecan Island, Louisiana area the Vermilion Corporation's ancestors obstructed or destroyed the "navigable capacity" of a "highway of commerce," these oil companies would have *ipso facto* violated 33 U.S.C. 403, which states that no person may pose any "obstruction" to the "navigable capacity" of "navigable waters of the United States." *United States v. Republic Steel*, 362 U.S. 482, 4 L.Ed.2d 903, 80 S.Ct. 884 [1960], says that "obstruction" in Section 403 is not limited to the listing which appears in the statute, but comprehends any kind or type of obstruction.

May the law countenance the development of a privately controlled artificial waterway system via the use and destruction

of a pre-existing and natural public waterway system? Petitioners think not, and believe that the remedy, as *United States v. Kaiser-Aetna* shows, for the abridgement of the constitutionally based public right of navigation and for the specific violation of 33 U.S.C. 403, is to say that the navigation servitude which existed on the natural navigable waterway prior to the development of the artificial waterway system, but which was destroyed in fact via that development, is simply transposed in law to and upon the new artificial canal system.

Judge Allen Babineaux thought it made no difference whether or not there was in the Pecan Island area prior to 1940 a natural navigable waterway system, which was impaired or destroyed via the subsequent development of a "private" waterway system. The Court of Appeal, Third Circuit, and the Louisiana Supreme Court, agreed. Accordingly, since the resolution of the factual dispute of the parties on this point was erroneously held by the Courts below to have made no difference, a Motion for Summary Judgment was wrongly granted, its granting was erroneously affirmed, and Petitioners, as citizens and members of the public, were denied a right of use of navigable waterways which no state and no oil company is supposed to be able to take from them.

QUESTION 2

ARE CHANNELS BUILT ON PRIVATE PROPERTY AND WITH PRIVATE FUNDS, WHICH THEREBY ARE MADE TO JOIN WITH ADMITTED AND PRE-EXISTING TIDAL AND OTHER NAVIGABLE WATERWAYS, AND WHICH ARE THEMSELVES NAVIGABLE IN FACT AND TIDAL, "NAVIGABLE WATERS OF THE UNITED STATES," BURDENED WITH A "NAVIGATION SERVITUDE" IN FAVOR OF THE PUBLIC?

The parties agree that the sixty foot wide by eight foot deep artificial canal system developed by Vermilion Corporation's ancestors in title is navigable in fact: Crew boats, cargo boats, fishing boats, drilling barges, and similar vessels have regularly used these canals since their creation. The primary purpose of the canals is to further petroleum exploration and production operations in the area. The canals secondarily are used by sportsmen and fishermen as fishing grounds and as a means of ingress to and egress from the Gulf of Mexico and various fresh waters in the area.

One can launch a boat at the headwaters of this canal system and navigate South into the Gulf of Mexico, or East into West Chenier Au Tigre Canal or Fresh Water Bayou Canal, or North via Schooner Bayou to the Gulf Intracoastal Waterway, and thus sail from Pecan Island unimpeded to Jacksonville, or Tierra del Fuego.

It is also undisputed that the waters of this canal system are brackish. Many of the fish species therein are of salt water origin. Daily these canals rise and fall perceptibly with the tides.

In *United States v. Sexton Cove Estates*, 389 F.Supp. 602, S.D. Fla., 1975, and in *United States v. Kaiser-Aetna, supra*,

Page 53, one sees unquestioned recognition of the proposition that, although a canal system be developed with private funds on private property, if the canals created thereby are navigable in fact and are subject to tidal fluctuation and otherwise connect with other "navigable waters of the United States," the canals so created themselves become "navigable waters of the United States," and thus become burdened with a "navigation servitude."

The concept of private dominion from the sky to the center of the earth for him who owns the land ceases now, as it always has, when the private owner digs a ditch sufficiently large, and connects it with other navigable waterways to such an extent, that enough water flows through that ditch to support commerce. The private owner's property is not thereby expropriated. There simply arises, for purposes of surface use of the waterways, a servitude in favor of the citizens of the United States generally to navigate over and fish upon those waters, and to that limited extent, the private owner who built the canals cannot control their use.

The Trial Court, in following *National Audubon Society v. White*, the Court of Appeal, Third Circuit, in originally rendering the opinion therein and in following it in this case, and the Louisiana Supreme Court, in its denial of writs, committed error, for, despite the fact that it is undisputed between the parties to this litigation that the "Humble Canal" system is navigable in fact and connected to other waterways navigable in fact and law, all Louisiana Courts held that as a matter of law it made no difference; that the canals were nevertheless private property, subject to private dominion and control. Louisiana thus firmly reiterated in response to this second of Petitioners' contentions its old idea: No matter how navigable in fact and law, no matter how obviously connected to interstate commercial waterways, no matter how intimately joined to and associated with the Gulf of Mexico, the canals built by, primarily,

the oil companies which have explored and produced the Louisiana wetlands remain their private property in all respects.

It is time, Petitioners believe, that Louisiana's law be made to yield to the principles which have grown out of the "common right of piscary" and finally out of the Supreme Law of the Land: The "navigation servitude" must have the same effect in Louisiana, and for the oil companies, as it does in other places and for other persons.

Respectfully submitted,

MOUTON, ROY, CARMOUCHE,
BIVINS & HILL

By: John K. Hill, Jr. per m.a.s.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LOUISIANA 70502
(318) 233-7430

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition and Attachments have been duly mailed to counsel for Respondent, Mr. Charles Sonnier, Attorney at Law, P. O. Box 519, Abbeville, Louisiana 70510.

Lafayette, Louisiana, June 22, 1978.

John K. Hill, Jr. jr.m.s.

JOHN K. HILL, JR.

EXHIBIT A-1

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15TH JUDICIAL DISTRICT COURT

DOCKET NUMBER 35948

PARISH OF VERMILION, LOUISIANA

MINUTE ENTRY

The Court is concerned here with a motion for summary judgment wherein the plaintiff claims there is no material issue of fact and prays for a permanent injunction prohibiting defendant from trespassing on his lands. The alleged trepasses involve the use by defendant of certain canals on plaintiff's property.

The defendant opposes the motion essentially by claiming there is material issue of fact as to whether or not the construction of the canals on plaintiff's property has "impaired or interrupted the navigability of an already existing natural waterway."

To support their position that the impairment of the navigability of a natural waterway is an issue material to this case, the defendant cites *Ilhenny v. Broussard*, 135 So. 609, (Sup. Ct. 1931). Although the Court in that case does note that there is "some authority" for the proposition that the public is entitled to the use of a new canal which obstructs a navigable waterway,

it ultimately rejects that authority, and denies the defendant the right to use a privately built canal.

The facts this Court feels are important are that the canals were constructed with private funds on private property; that the canals have been maintained privately and the use thereof has been restricted use with permission only; and, there are numerous trepass signs indicating the private nature of the canals involved.

We distinguish *D'Albara v. Garcia*, 144 So. 2d 911, and *Discon v. Saray*, 265 So. 2d 765, as did the Third Circuit in *National Audubon Society v. White*, 302 So. 765 660, by noting that those cases found that the waterways involved were either part of the public domain or had been dedicated for the public use. In the case at hand we find the canals are privately maintained and have not been dedicated for the public use.

We find that the Third Circuit's statement of the law in *National Audubon Society v. White* and the Supreme Courts decision in *Ilhenny v. Broussard* are controlling; and even taking the allegations of defendant, that the canals have obstructed or diverted "navigable waters of the United States" we must conclude that navigable waterway constructed with private funds on private land is a private thing and not open for public use.

Therefore, this Court grants the motion for summary judgment, and permenantly enjoins defendant, Norman Vaughn, from trespassing on any lands or canals located within the confines of the properties leased by plaintiff.

Cost of these proceedings are to be borne by defendant. Judgment in accordance with the foregoing to be signed upon presentation.

Lafayette, Louisiana this 7 day of June, 1977.

/s/ illegible
DISTRICT JUDGE

FILED 6-9 19 77

/s/ Clara F. Frederick
Deputy Clerk of Court
Vermilion Parish, La.

FILED THIS 7

DAY OF June 19 77

/s/ Jan Hebert
DY. CLERK OF COURT

EXHIBIT A-2

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15TH JUDICIAL DISTRICT COURT

NUMBER: 35,958

VERMILION PARISH, LOUISIANA

VERMILION CORPORATION

VERSUS

LARRY L. BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36,983

VERMILION PARISH, LOUISIANA

VERMILION CORPORATION

VERSUS

FREDDIE BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36,982

VERMILION PARISH, LOUISIANA

JUDGMENT

The Motion For Summary Judgment filed herein by Vermilion Corporation came to be heard on May 31, 1977; those present were:

John K. Hill, Attorney for Defendants
Norman Vaughn, Larry L. Broussard and
Freddie Broussard;

Charles R. Sonnier and John E. Ortego,
Attorneys for Plaintiff Vermilion Corporation.

After reviewing the pleadings, briefs, motions, affidavits, depositions, stipulations, and hearing the arguments of counsel, the Court considering that there is no genuine issue as to material facts, and that Mover is entitled to a Judgment as a matter of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that there be Judgment herein in favor of the Plaintiff, Vermilion Corporation, and against the Defendants, Norman Vaughn, Larry L. Broussard and Freddie Broussard, permanently prohibiting, restraining and enjoining defendants from trespassing on any lands or canals located within the confines of the properties leased by Vermilion Corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of these proceedings are to be born by the defendants.

Judgment rendered in Lafayette, Louisiana, on the 7th day of June 1977; read and signed at _____, Louisiana, on the _____ day of June, 1977.

_____

JUDGE

APPROVED AS TO FORM:

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER

BY: /s/ John E. Ortego
JOHN E. ORTEGO
Attorneys for Plaintiff
Vermilion Corporation

MOUTON, ROY, CARMOUCHE, HAILEY, BIVENS, & MCNAMARA

BY: _____
JOHN K. HILL
Attorneys for Defendants,
Norman Vaughn, Larry R. Broussard
and Freddie Broussard

EXHIBIT A-3

NO. 6258

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

VERMILION CORPORATION

Plaintiff-Appellee

VERSUS

NORMAN VAUGHN

Defendant-Appellant

Appeal from the 15th Judicial District Court, Parish of Vermilion, State of Louisiana; Hon. Allen M. Babineaux, District Judge, Presiding.

Before CULPEPPER, DOMENGEAUX, and WATSON, Judges

DOMENGEAUX, JUDGE

This suit involves the right of the public to use man-made navigable canals on private property constructed and maintained with private funds.

This case was consolidated for trial and appeal with *Vermilion Corporation v. Freddie Broussard*, _____ So.2d _____, No. 6259, (La. App. 3rd Cir. 1978), and *Vermilion Corporation v. Larry J. Broussard*, _____ So.2d _____, No. 6260 (La. App. 3rd Cir. 1978).

The issues are the same in these three cases, and will be discussed herein, although separate opinions in each case are being rendered on this day.

Vermilion Corporation, plaintiff-appellee, leases 125,000 acres of land in Vermilion Parish owned by the Exxon Company. The land is traversed by a system of man-made canals. The canals are approximately 60 feet wide and 8 feet deep, are subject to tidal fluctuations, and are navigable in fact. They were constructed with private funds and have been under the continuous control, possession, and supervision of Vermilion Corporation, Exxon Company, and all prior owners since the 1900s.

The canal system enters other naturally navigable waterways and lies between the Intracoastal Canal on the north, the Gulf of Mexico on the south, West Cheniere Au Tigre Canal on the east, and Rollover Bayou on the west. The canals are used to facilitate hunting, trapping, and fishing activities, and are also used by the Exxon Company for hydrocarbon exploration and development activities. Vermilion Corporation subleases portions of the land to hunters, trappers, and fishers. The right to use the canals is a part of the lease arrangement.

In order to control access to the land and the canals, over 400 "No Trespassing" signs are posted in various locations. In addition persons have been continuously employed to supervise activities in the canals and on the land. On numerous occasions Vermilion Corporation has prohibited persons from entering and using the property.

The present controversy arose when the defendants-appellants, Norman Vaughn, Freddie Broussard, and Larry J. Broussard, continued to enter the property and travel the canals in order to engage in commercial fishing and shrimping activities without obtaining plaintiff's permission. These individuals

disregarded several written warnings issued by plaintiff. Consequently, these suits were filed seeking permanent injunctions enjoining the three defendants from trespassing on the property and in the canals and damages. [1]

After affidavits and a deposition were filed into the record, the corporation moved for summary judgments, which were granted by the trial court. Permanent injunctions against Vaughn and the Broussards were issued. They have perfected devolutive appeals.

Defendants contend on appeal that the trial court erred in two respects:

1. In finding that there was no issue of material fact and, therefore, in granting the motions for summary judgment, and

2. In finding that the canal could be controlled by the plaintiff and, therefore, in granting the permanent injunctions.

I. SUMMARY JUDGMENTS

Article 966 of the La. Code of Civil Procedure provides:

> "The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

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1 No proof of damages was introduced in the District Court and no mention of damages is made on appeal. We, therefore, will not discuss the issue.

> The motion for summary judgment shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the day of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."

In the present case the parties are in agreement on all relevant facts that are genuinely material to this case and upon which a judgment can be rendered. There is no question that the canals are navigable and were built and maintained with private funds on private property. It is not contested that defendants did engage in fishing and shrimping activities in the canals without permission.

Defendants contend, however, that there is a fact in dispute which is genuinely material to this litigation and that summary judgment was improper. They claim that plaintiff's system of artificial waterways destroyed the navigability of surrounding natural waterways. They argue that this is material because, if true, the court could conclude that the system of artificial waterways was substituted for the pre-existing natural system of navigable waterways. If such a conclusion were reached, the canals would not be private and could not be privately controlled under state and federal law.

We do not agree. A similar argument was raised in *Ilhenny v. Broussard*, 172 La. 895, 135 So. 669 (1931), the facts of which are almost the same as in the present case. The plaintiff in that case, E. A. McIlhenny, constructed a private canal on his property. The defendant, Broussard, continued to use this canal without McIlhenny's permission. McIlhenny sought to

enjoin Broussard from using his private waterway. The contention was made that the waters from a natural canal were diverted by the man-made waterway and that therefore the man-made waterway was substituted for the natural waterway. The Louisiana Supreme Court rejected the argument stating that the diversion of water from a natural channel by a private man-made waterway does not give rise to a right of the public to use the man-made waterway. [2]

Defendants also contend that this litigation is too important to be disposed of by summary judgment. We fail to see the validity of this argument. Simply because there is no issue of material fact does not mean that the courts will not give a case full and complete treatment. Summary judgment merely avoids a full trial where the need does not exist. The effect of a case on Louisiana law is not a valid reason for denying a party's right to summary judgment.

We therefore find no error on the part of the trial court in granting summary judgment in favor of plaintiff.

II. THE INJUNCTIONS

Defendants contend that the injunctions should not have been granted as a matter of state and federal law. They argue

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2 *See also, National Audubon Society v. White*, 302 So.2d 660 (La. App. 3rd Cir. 1974), *writ denied* 305 So.2d 542 (La. 1975) (No error of law), discussed *infra*.

that under La.R.S. 14:97 [3] and under 33 USCA Sec. 403 [4] (§ 10 of the Rivers and Harbors Act) a private individual may not exert dominion over a navigable waterway.

With regard to state law, this court discussed the application of La.R.S. 14:97 to a private canal in *National Audubon Society v. White*, 302 So.2d 660 (La. App. 3rd Cir. 1974), writ denied 305 So.2d 542 (La. 1975), a case which defendants contend was erroneous and should be overruled.

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3 §97. Simple obstruction of a highway of commerce

Simple obstruction of a highway of commerce is the international or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway or an airport, which will render movement thereon more difficult.

Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both.

4 §403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The facts of *Audubon* mirror those in the present controversy. In that case a private canal was constructed in 1912 by E. A. McIlhenny on his property in Vermilion Parish. The canal, which was the same canal involved in *Ilhenny v. Broussard, supra*, was navigable and connected with Vermilion Bay. In 1924 a portion of the land, including a part of the canal, was donated to the National Audubon Society. That organization used the property to operate the Paul J. Rainey Wildlife Sanctuary. The Audubon Society maintained their portion of the McIlhenny canal with its own funds. Access to the canal was restricted by the Audubon Society as it was restricted prior to the donation. The defendant in that case, Joseph White, used the canal without permission for fifty years to haul cattle, cotton, vegetables, and fruit to the market. In 1971 and 1972 he was notified by the Audubon Society that he could no longer use the canal. These notices were disregarded and suit for a permanent injunction to enjoin him from using the canal followed.

This court granted the injunction and held that a canal built entirely on private property with private funds for private purposes is a private thing. White contended that a landowner was prohibited from obstructing any navigable waterway, regardless of whether it was constructed with private funds, by virtue of La. R.S. 14:97, as applied by the Supreme Court in *Discon v. Saray, Inc.*, 262 La. 997, 265 So.2d 765 (1972), and the Fourth Circuit in *D'Albora v. Garcia*, 144 So.2d 911 (La. App. 4th Cir. 1962).

In *Discon*, landowners whose property bordered on a navigable canal dedicated for the use of the property owners, sought to enjoin another landowner from obstructing a portion of the canal. The Supreme Court concluded that plaintiffs were entitled to injunctive relief under La. R.S. 14:97. In *D'Albora* an injunction was sought to enjoin the owner of land from restricting passage on a navigable canal running through his

property. The canal was dug by the State of Louisiana to obtain dirt for the construction of a highway. The Fourth Circuit affirmed the action of the trial court in granting the injunction on the basis of La. R.S. 14:97.

We distinguished *Discon* and *D'Albora* in *Audubon* on the basis that the canals in those cases were either built with public funds or involved a dedicated right of way. We held that La. R.S. 14:97 was inapplicable to a private canal which was not part of the public domain or was not dedicated to the public use, stating the following:

> "We distinguish the D'Albora and Discon cases from the instant suit, because in each of those cases the canal was either a part of the public domain or it had been dedicated for use by the owners of property in the subdivision in which the canal was located.
>
> We have concluded that LSA-R.S. 14:97 does not apply to a privately owned canal, even though it may be navigable. We agree with the views expressed by Professor A. N. Yiannopoulos, in discussing the case of Discon v. Saray, Inc., supra, where he stated:
>
> 'The majority opinion necessarily rests on the assumption that the canal in question was burdened with a servitude of public use. *Indeed, it would be inconceivable to apply article 97 of the Criminal Code to a strictly private waterway.* The majority proceeded on the idea that this article was applicable because the canal was navigable, and, therefore, was burdened with a servitude of public use; in the alternative, that the canal was burdened with a servitude of public use by virtue of dedication. *No one, however, should be prepared to accept the proposition that all navigable waterways in Louisiana are subject to public use merely by virtue of the fact they are navigable. A privately owned canal, though navigable in fact, may not be subject to public use, for the same reasons that a private road, though used by commercial traffic, may not be subject to public use. Thus, the disposition of the case would be correct only if the canal in question had been dedicated to public use.'* (Emphasis added)"

303 So.2d 660, 667-668.

We are convinced that the decision of *National Audubon Society v. White* was correct and apply it to this case. We hold that a canal on private property constructed and maintained with private funds and used for private purposes is a private canal subject to private control.

With regard to federal law, defendants have cited several federal cases [5] for the proposition that under 33 USCA Section 403, private individuals cannot control navigable waterways.

We have examined all of the federal cases and found them completely distinguishable from the present litigation. The cited cases involved situations where the United States was

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5 *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Twin City Power Company*, 350 U.S. 222 (1956); *United States v. Willow River Power Company*, 324 U.S. 499 (1945); *United States v. Appalachian Electric Power Company*, 311 U.S. 377 (1940); *United States v. Sexton Cove Estates, Inc.*, 389 F.Supp. 602 (S.D.Fla. 1975), affirmed in part, reversed in part, 526 F. 2d 1293 (5th Cir. 1976); *United States v. Cannon*, 363 F. Supp. 1045 (D.Del. 1973); *United States v. Pot-Nets, Inc.*, 363 F. Supp. 812 (D.Del. 1973); *United States v. Underwood*, 344 F. Supp. 486 (M.D.Fla.1972); *United States v. 412.715 Acres*, 53 F. Supp. 143 (N.D. Calif. 1943).

either seeking to expropriate private property or seeking to prevent the impairment of naturally navigable waterways.

In any event, we fail to see how 33 USCA Section 403 would forbid a landowner from prohibiting the general public from using his private canal. The statute grants authority to the Chief of Engineers and the Secretary of the Army to control waterways, but it does not grant individuals the unrestricted right to use a privately owned navigable canal. Our research has revealed the case of *United States v. Kaiser-Aetna*, 408 F. Supp.42 (D.Ha.1976), in which the United States attempted to use the same legislation to force Kaiser-Aetna to open a private marina in Hawaii to the public. The marina was originally a lagoon, Kuapa Pond, which was used as a fishing spot by the Hawaiian natives. The lagoon connected with Maunalua Bay, a navigable waterway. Under Hawaiian property law there was no question that the fish pond was private property. Kaiser-Aetna acquired interests in the pond and surrounding land. It developed a subdivision and transformed the fish pond into a marina. Use of the marina was restricted and all commercial vessels were excluded.

The federal court recognized the regulatory power of the federal government under its admiralty powers but it refused to find that the United States could appropriate the waterway to public use without reasonable compensation. The Court stated:

> ". . . . [P]rivate 'fast' lands and waters when made navigable by improvements or which could be made navigable are subject to Congressional regulation. Nevertheless while Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed

> waterway without paying a reasonable compensation for the use thereof.
>
> Here then, since Kaupar Pond has been transformed into navigable waters used in commerce, the marina has therefore become subject to regulation by Congress and within admiralty jurisdiction. It does not follow, however, that the United States can, without payment, appropriate those waters for *public* use and deprive the defendants of their investment or any return on it." [Footnote omitted]

408 F. Supp. 42, 54.

If the public has no right of use on a natural waterway made navigable by private funds under federal law, then *a fortiori* it has no right of use on an artificial navigable waterway constructed with private funds.

Thus, under state and federal law a canal on private property constructed and maintained with private funds for private purposes is a private canal, the use of which can be restricted by the landowner or his assigns. The injunctions in these cases in favor of the landowner's lessee was proper.

For the above reasons we affirm the judgment of the District Court. All costs are to be assessed against the defendant-appellant.

AFFIRMED.

EXHIBIT A-4

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

VERMILION CORPORATION March 27, 1978

V.

NORMAN VAUGHN NO. 61,736

In re: Norman Vaughn, Freddie Broussard and Larry J. Broussard applying for Certiorari, or writ of review, to the court of Appeal Third Circuit Parish of Vermilion

---

Writ denied.

WFM

JWS

FWS

AT JR

DIXON, CALOGERO, J. J. vote to grant the writ.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
March 27, 1978

/s/ illegible
DEPUTY CLERK

EXHIBIT B (in globo)

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15TH JUDICIAL DISTRICT COURT

NUMBER: 35948

VERMILION PARISH, LOUISIANA

PETITION FOR PERMANENT INJUNCTION
AND DAMAGES

The petition of VERMILION CORPORATION, a corporation organized under the laws of the State of Delaware and authorized to do business in the State of Louisiana, with respect, represents that:

1.

Petitioner is the Lessee of and is in possession of certain lands in Vermilion Parish, Louisiana, which lands are fully described in the copy of the lease and amendments attached hereto and marked Exhibits "A", "B", and "C".

2.

Petitioner, pursuant to the terms and provisions of said lease and amendment, and under the authority therein granted is entitled to bring this action in the place and stead of the Lessor named in said lease and amendment, its successors or assigns.

3.

Norman Vaughn, a resident of Vermilion Parish, Louisiana, has without permission of your petitioner, trespassed on the lands of petitioner and more particularly in the private canals located within said lands, despite the fact that said lands are properly posted with "No Trespassing, Vermilion Corporation" signs, showing the properties and canals to be subject to the exclusive possession of petitioner.

4.

All of the canals in question were built and have been maintained by either petitioner, its lessor, their predecessors, their agents, assigns or sublessees.

5.

Said trespass by defendant, Norman Vaughn, was willful and knowing on his part and occurred on several occasions and more particularly on or about June 26, 1975, in a canal at a point approximately one-fourth (1/4) of a mile North of Exxon Company Well No. 21, located in Section 26, Township 16 South, Range 1 West.

6.

Again, on or about July 18, 1975, defendant, Norman Vaughn, trespassed at a point approximately one-eighth (1/8) of a mile East of Exxon Company WEll No. 46, located in Section 29, Township 16 South, Range 1 East.

7.

Defendant again trespassed on or about September 14, 1975, at a point located between two bridges constructed across what

is known as the Humble Canal, located in Section 31, Township 16 South, Range 2 East.

8.

Defendant again trespassed on or about September 24, 1975, at a point approximately one-half (1/2) mile East of a cattle crossing on the Humble Canal located in Section 26, Township 16 South, Range 1 East.

9.

On each of said occasions, defendant, Norman Vaughn, was issued a warning and notice by Murphy Sellers, the Field Superintendent and Warden of petitioner in the presence of petitioner's employee, Earl Harden. Said Warning being given to defendant in the form of legal notices, copies of which are attached hereto and marked Exhibit "D", for identification.

10.

At the time of each trespass and at other times not herein specified, defendant has engaged in commercial fishing and/or shrimping in petitioner's canals resulting in the harvest of large catches of shrimp and fish of great value.

11.

Defendant's actions and defiance of ample warning has directly and indirectly encouraged others to trespass and engage in commercial fishing, all to plaintiff's detriment.

12.

Additionally, defendant has caused petitioner to suffer damages past, present and future, due to the illegal and

unauthorized fishing in a sum exceeding $ 250,000.00, all of which will be more accurately determined on the trial hereof.

13.

Despite the warnings given to defendant by the Warden, Murphy Sellers, the said Norman Vaughn continues to trespass and fish on the several canals subject to the control and possession of petitioner causing the damages enumerated.

14.

The defendant thus violated the rights of petitioner by his act of trespassing and petitioner is entitled to an injunction enjoining and prohibiting the said Norman Vaughn from trespassing on the property and canals within the property in control and possession of petitioner, pursuant to the above mentioned leases and for the damages in excess of $250,000.00, all of which is to be more fully shown at the trial hereof.

WHEREFORE, petitioner prays that the defendant be duly cited to appear and answer this petition and after due proceedings had, there be judgment herein in favor of petitioner Vermilion Corporation, and against the defendant, Norman Vaughn, decreeing the above acts of defendant to constitute a trespass of the rights of petitioner and enjoining, restraining and prohibiting Norman Vaughn from trespassing on any property and canals within the property of petitioner as described in the leases mentioned in paragraph 1 above, and further, that said defendant be assessed with all proven damages and costs of court.

And for all general and equitable relief, etc.

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
Attorneys for Petitioner
121 East St. Victor
P. O. Box 519
Abbeville, LA 70510
(318) 893-6766

PLEASE SERVE:

Norman Vaughn
Pecan Island Route, Box 86
Kaplan, Louisiana 70548

FILED 11/7 19 75

/s/ Roy James Hebert
Deputy Clerk of Court
Vermilion Parish, La.

A TRUE COPY
ATTEST:

/s/ Roy James Hebert
Deputy Clerk of Court
Vermilion Parish, La.

VERMILION CORPORATION

VERSUS

FREDDIE BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36982 - E

VERMILION PARISH, LOUISIANA

PETITION FOR PERMANENT INJUNCTION
AND DAMAGES

The petition of VERMILION CORPORATION, corporation organized under the laws of the State of Delaware and authorized to do business in the State of Louisiana, with respect, represents that:

1.

Petitioner is the Lessee of and is in possession of certain lands in Vermilion Parish, Louisiana, which lands are fully described in the copy of the lease and amendments attached hereto and marked Exhibits "A", "B", and "C".

2.

Petitioner, pursuant to the terms and provisions of said lease and amendment, and under the authority therein granted is entitled to bring this action in the place and stead of the Lessor named in said lease and amendment, its successors or assigns.

3.

Freddie Broussard, a resident of Vermilion Parish, Louisiana, has without permission of your petitioner, trespassed on the lands of petitioner and more particularly in the private canals located within said lands, despite the fact that said lands are properly posted with "No Trespassing, Vermilion Corporation" signs, showing the properties and canals to be subject to the exclusive possession of petitioner.

4.

All of the canals in question were built and have been maintained by either petitioner, its lessor, their predecessors, their agents, assigns or sublessees.

5.

Said trespass by defendant, Freddie Broussard, was willful and knowing on his part and occurred on or about July 18, 1975, in a canal at a point designated as Humble Canal, Location No. 13, located in Section 33, Township 16 South, Range 1 East.

6.

On said occasion, defendant, Freddie Broussard, was issued a warning and notice by Murphy Sellers, the Field Superintendent and Warden of petitioner in the presence of petitioner's employee, Earl Harden. Said Warning being given to defendant in the form of a legal notice, a copy of which is attached hereto and marked Exhibit "D", for identification.

7.

At the time of said trespass defendant was engaged in commercial fishing and/or shrimping in petitioner's canals resulting in the harvest of large catches of shrimp and fish of great value.

8.

Defendant's actions and defiance of ample warning has directly and indirectly encouraged others to trespass and engage in commercial fishing, all to plaintiff's detriment.

9.

Additionally, defendant has caused petitioner to suffer damages past, present and future, due to the illegal and unauthorized fishing in a sum exceeding $250,000.00, all of which will be more accurately determined on the trial hereof.

10.

Despite the warnings given to defendant by the Warden, Murphy Sellers, the said Freddie Broussard continues to trespass and fish on the several canals subject to the control and possession of petitioner causing the damages enumerated.

11.

The defendant thus violated the rights of petitioner by his act of trespassing and petitioner is entitled to an injunction enjoining and prohibiting the said Freddie Broussard from trespassing on the property and canals within the property in control and possession of petitioner, pursuant to the above mentioned leases and for the damages in excess of $250,000.00, all of which is to be more fully shown at the trial hereof.

WHEREFORE, petitioner prays that the defendant be duly cited to appear and answer this petition and after due proceedings had, there be judgment herein in favor of petitioner Vermilion Corporation, and against the defendant, Freddie Broussard, decreeing the above acts of defendant to constitute a trespass of the rights of petitioner and enjoining, restraining and prohibiting Freddie Broussard from trespassing on any property and canals within the property of petitioner as described in the leases mentioned in paragraph 1 above, and further, that said defendant be assessed with all proven damages and costs of court.

And for all general and equitable relief, etc.

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER
121 East St. Victor
Post Office Box 519
Abbeville, Louisiana 70510

PLEASE SERVE:

Freddie Broussard
Pecan Island Route
Kaplan, Louisiana 70548

FILED 10 - 12 19 76

/s/ Clara F. Frederick
Deputy Clerk of Court
Vermilion Parish, La.

A TRUE COPY
ATTEST:

/s/ Clara F. Frederick
Deputy Clerk of Court
Vermilion Parish, La.

VERMILION CORPORATION

VERSUS

LARRY J. BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36983

VERMILION PARISH, LOUISIANA

PETITION FOR PERMANENT INJUNCTION
AND DAMAGES

The petition of VERMILION CORPORATION, a corporation organized under the laws of the State of Delaware and authorized to do business in the State of Louisiana, with respect, represents that:

1.

Petitioner is the Lessee of and is in possession of certain lands in Vermilion Parish, Louisiana, which lands are fully described in the copy of the lease and amendments attached hereto and marked Exhibits "A", "B", and "C".

2.

Petitioner, pursuant to the terms and provisions of said lease and amendment, and under the authority therein granted is entitled to bring this action in the place and stead of the Lessor named in said lease and amendment, its successors or assigns.

3.

Larry J. Broussard, a resident of Vermilion Parish, Louisiana, has without permission of your petitioner, trespassed on the lands of petitioner and more particularly in the private canals located within said lands, despite the fact that said lands are properly posted with "No Trespassing, Vermilion Corporation" signs, showing the properties and canals to be subject to the exclusive possession of petitioner.

4.

All of the canals in question were built and have been maintained by either petitioner, its lessor, their predecessors, their agents, assigns or sublessees.

5.

Said trespass by defendant, Larry J. Broussard, was willful and knowing on his part and occurred on several occasions and more particularly on or about August 19, 1975, at a point designated as Location No. 22, located in Section 31, Township 16 South, Range 1 East.

6.

Again, on or about June 2, 1976, defendant, Larry J. Broussard, trespassed in a canal at a point designated as Well Location No. 21, located in Section 26, Township 16 South, Range 1 West.

7.

On each of said occasions, defendant, Larry J. Broussard, was issued a warning and notice by Murphy Sellers, the Field Superintendent and Warden of petitioner in the presence of

petitioner's employee, Earl Harden. Said Warning being given to defendant in the form of legal notices, copies of which are attached hereto and marked Exhibit "D", for identification.

8.

At the time of each trespass and at other times not herein specified, defendant has engaged in commercial fishing and/or shrimping in petitioner's canals resulting in the harvest of large catches of shrimp and fish of great value.

9.

Defendant's actions and defiance of ample warning has directly and indirectly encouraged others to trespass and engage in commercial fishing, all to plaintiff's detriment.

10.

Additionally, defendant has caused petitioner to suffer damages past, present and future, due to the illegal and unauthorized fishing in a sum exceeding $250,000.00, all of which will be more accurately determined on the trial hereof.

11.

Despite the warnings given to defendant by the Warden, Murphy Sellers, the said Larry J. Broussard continues to trespass and fish on the several canals subject to the control and possession of petitioner causing the damages enumerated.

12.

The defendant thus violated the rights of petitioner by his act of trespassing and petitioner is entitled to an injunction enjoining and prohibiting the said Larry J. Broussard from

trespassing on the property and canals within the property in control and possession of petitioner, pursuant to the above mentioned leases and for the damages in excess of $250,000.00, all of which is to be more fully shown at the trial hereof.

WHEREFORE, petitioner prays that the defendant be duly cited to appear and answer this petition and after due proceedings had, there be judgment herein in favor of petitioner Vermilion Corporation, and against the defendant, Larry J. Broussard, decreeing the above acts of defendant to constitute a trespass of the rights of petitioner and enjoining, restraining and prohibiting Larry J. Broussard from trespassing on any property and canals within the property of petitioner as described in the leases mentioned in paragraph 1 above, and and costs of court.

And for all general and equitable relief, etc.

COOPER & SONNIER

BY: _____

CHARLES R. SONNIER
121 East St. Victor
Post Office Box 519
Abbeville, Louisiana 70510

PLEASE SERVE:

Larry J. Broussard
Pecan Island Route
Kaplan, Louisiana 70548

A TRUE COPY
ATTEST:

/s/ Gladys R. Gaspard
Deputy Clerk of Court
Vermilion Parish, La.

FILED 10-12 19 76

/s/ Gladys R. Gaspard
Deputy Clerk of Court
Vermilion Parish, La.

EXHIBIT C (in globo)

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15th JUDICIAL DISTRICT COURT

NUMBER: 35948

PARISH OF VERMILION, LOUISIANA

ANSWER

NOW COMES NORMAN VAUGHN, defendant herein, and for answer to plaintiff's petition, says that:

1.

Article 1 is denied for lack of sufficient information to justify a belief therein.

2.

Article 2 is denied.

3.

Article 3 is denied as written, Norman Vaughn further showing that the canals and other waterways referred to in this Article and at other points in plaintiff's petition are navigable waters, and navigable waters of the United States, and subject

to a paramount right of use for and on behalf of the public and citizens of the United States and are not subject to private ownership or control.

4.

Article 4 is denied for lack of sufficient information to justify a belief therein.

5.

Article 5 is denied as written.

6.

Article 6 is denied as written.

7.

Article 7 is denied as written.

8.

Article 8 is denied as written.

9.

Article 9 is admitted as to the facts alleged therein.

10.

Article 10 is denied as written.

11.

Article 11 is denied as written and denied for lack of sufficient information to justify a belief therein.

12.

Article 12 is denied.

13.

Article 13 is denied as written.

14.

Article 14 is denied.

15.

Plaintiff's acts in attempting to restrain use by petitioner of any canals or waterways mentioned herein, and plaintiff's act in filing and maintaining this lawsuit, are both prohibited by the Rivers and Harbors Act, 33 U.S.C. 401, et sequittur. in that such attempts by plaintiff constitute an obstruction to the navigable capacity of the navigable waters of the United States

16.

Apart from any such statutory violations, plaintiff's attempt to restrain or impair or prohibit, via lawsuit or otherwise, the use by plaintiff or any others of the canals or other bodies of water mentioned herein is unlawful due to the character of said waters as navigable waters of the United States not subject to private ownership or dominion, but instead burdened with a paramount easement of use in favor of the public. All waterways mentioned in this lawsuit are subject to tidal fluctuations

and/or are navigable in fact based upon their actual and potential uses as highways of commerce and fisheries.

17.

For the above reasons, plaintiff is without cause or right of action herein and has failed to state same in its petition. Plaintiff is also without cause or right of action as to its claim for damages based upon severance of shrimp and other fishes from its alleged private waters as, by specific provision of R.S. 56-311 and 312, said shrimp and fishes are not subject to private ownership, dominion or control.

WHEREFORE, defendant prays that this answer be deemed good and sufficient and after due delays and proceedings, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands with prejudice and at its cost.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Answer has been mailed to counsel for plaintiff herein.

Lafayette, Louisiana, March 17, 1977.

/s/ John K. Hill, Jr.
JOHN K. HILL, JR.

VERMILION CORPORATION

VERSUS

FREDDIE BROUSSARD

15th JUDICIAL DISTRICT COURT

NUMBER: 36982 - E

VERMILION PARISH, LOUISIANA

ANSWER

NOW COMES FREDDIE BROUSSARD, and for answer to the petition of Plaintiff herein, says that:

1.

Article 1 is denied for lack of sufficient information to justify a belief therein.

2.

Article 2 is denied for lack of sufficient information to justify a belief therein.

3.

Article 3 is denied as written.

4.

Article 4 is denied for lack of sufficient information to justify a belief therein.

5.

Article 5 is denied as written.

6.

Article 6 is admitted as to the facts alleged therein.

7.

Article 7 is denied as written.

8.

Article 8 is denied as written, denied, and denied for lack of sufficient information to justify a belief therein.

9.

Article 9 is denied.

10.

Article 10 is denied as written.

11.

Article 11 is denied.

12.

Plaintiff's acts in attempting to restrain use by petitioner of any canals or waterways mentioned herein, and plaintiff's act in filing and maintaining this lawsuit, are both prohibited by the Rivers and Harbor Act, 33 U.S.C. 401, et sequittur, in that such attempts by plaintiff constitute an obstruction to the navigable capacity of the navigable waters of the United States.

13.

Apart from any such statutory violations, plaintiff's attempt to restrain or impair or prohibit, via lawsuit or otherwise, the use by plaintiff of any others of the canals or other bodies of water mentioned herein is unlawful due to the character of said waters as navigable waters of the United States not subject to private ownership or dominion, but instead burdened with a paramount easement of use in favor of the public. All waterways mentioned in this lawsuit are subject to tidal fluctuations and/or are navigable in fact based upon their actual and potential uses as highways of commerce and fisheries.

14.

For the above reasons, plaintiff is without cause or right of action herein and has failed to state same in its petition. Plaintiff is without cause or right of action as to its claim for damages based upon severance of shrimp and other fishes from its alleged private waters as, by specific provision of R.S. 56-311 and 312, said shrimp and fishes are not subject to private ownership, dominion or control.

WHEREFORE, defendant prays that this answer be deemed good and sufficient and after due delays and proceedings, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands with prejudice and at its cost.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502

VERMILION CORPORATION

VERSUS

LARRY J. BROUSSARD

15th JUDICIAL DISTRICT COURT

NUMBER: 36983

VERMILION PARISH, LOUISIANA

ANSWER

NOW COMES LARRY J. BROUSSARD, and for answer to the petition of plaintiff herein, says that:

1.

Article 1 is denied for lack of sufficient information to justify a belief therein.

2.

Article 2 is denied for lack of sufficient information to justify a belief therein.

3.

Article 3 is denied as written.

4.

Article 4 is denied for lack of sufficient information to justify a belief therein.

5.

Article 5 is denied as written.

6.

Article 6 is denied as written.

7.

Article 7 is admitted as to facts alleged therein.

8.

Article 8 is denied as written.

9.

Article 9 is denied for lack of sufficient information to justify a belief therein and denied as written.

10.

Article 10 is denied.

11.

Article 11 is denied as written.

12.

Article 12 is denied.

13.

Plaintiff's acts in attempting to restain use by petitioner of any canals or waterways mentioned herein, and plaintiff's act in filing and maintaining this lawsuit, are both prohibited by the Rivers and Harbors Act, 33 U.S.C. 401, et sequittur, in that such attempts by plaintiff constitute an obstruction to the navigable capacity of the navigable waters of the United States.

14.

Apart from any such statutory violations, plaintiff's attempt to restrain or impair or prohibit, via lawsuit or otherwise, the use by plaintiff or any others of the canals or other bodies of water mentioned herein is unlawful due to the character of said waters as navigable waters of the United States not subject to private ownership or dominion, but instead burdened with a paramount easement of use in favor of the public. All waterways mentioned in this lawsuit are subject to tidal fluctuations and/or are navigable in fact based upon their actual and potention uses as highways of commerce and fisheries.

15.

For the above reasons, plaintiff is without cause or right of action herein and has failed to state same in its petition. Plaintiff is without cause or right of action as to its claim for damages based upon severance of shrimp and other fishes from its alleged private waters as, by specific provision of R.S. 56-311 and 312, said shrimp and fishes are not subject to private ownership, dominion or control.

WHEREFORE, defendant prays that this answer be deemed good and sufficient and after due delays and proceedings, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands with prejudice and at its cost.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502

EXHIBIT D (in globo)

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NOS. 6258, 6259, 6260

VERMILION CORPORATION

PLAINTIFF-APPELLEE

VERSUS

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD

DEFENDANTS-APPELLANTS

APPEALED FROM THE 15th JUDICIAL DISTRICT COURT, VERMILION PARISH, LOUISIANA, HONORABLE ALLEN M. BABINEAUX, PRESIDING JUDGE.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS, NORMAN VAUGHN, LARRY J. BROUSSARD and FREDDIE BROUSSARD

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502
(318) 233-7430)
COUNSEL FOR DEFENDANTS-APPELLANTS

[i]

[i]

SYLLABUS

I.

Summary Judgment must be used cautiously, is no substitute for trial, requires the resolving of all doubt concerning dispute as to issue of material fact in favor of trial on the merits, should be granted only when the mover is clearly entitled thereto, and must be denied if there is genuine issue of fact present, although the Court may feel that the party against whom the motion is brought has little chance to prevail at trial. LSA-C.C.P. Articles 966 through 969; *Laufer v. Touro Infirmary*, 324 So.2d 541; *Savoy v. Action Products Co.*, 324 So.2d 921, writ denied, 329 So.2d 463; *Rosen v. Capital City Press*, 314 So.2d 511.

II.

A body of water is "navigable water of the United States" if it is presently being used or is suitable for use for transportation and commerce, or if it has been so used or was suitable for such use in the past, or if it could be made suitable for such use in the future by reasonable improvements, the true criterion of navigability being the capability rather than manner and extent of use, and lack of commercial traffic being no bar to the conclusion that the waterway is navigable where personal and private use of boats demonstrates the availability of the waterway for the simpler types of commercial traffic; furthermore, the presence of tidal fluctuation in a body of water, and its opening onto or having access to the open sea, are criteria for determining whether or not it is "navigable water of the United States." *United States v. Cannon*, 363 F.Supp. 1045, District Court, Delaware, 1973; *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, D. C. Delaware, 1973; *United States v. Underwood*, 344 F.Supp. 486, Florida, 1972; *United States v. Stoeco Homes*, 498 F.2d 610; *United States v. Moretti*, 478 F.2d 428; and *United States v. Lewis*, 355 F.Supp. 1132.

[ii]

[ii]

III.

Under state law a private party may not obstruct passage of a highway of commerce, including a navigable waterway. LSA-R.S. 14:97; *Discon v. Saray*, 362 La. 997, 265 So.2d 765; *D'Albora v. Barcia*, 144 So.2d 911, La.App., 4th Cir. (1962).

IV.

Under federal law, a private party may not pose or place any obstruction, whether statutorily delineated or not, to the "navigable capacity" of the navigable water of the United States. 33 U.S.C. 403, *United States v. Republic Steel*, 80 S.Ct. 884.

V.

Manmade channels connecting with tidal water become navigable waters of the United States, notwithstanding that they are on private property and are developed with private funds. *United States v. Sexton Cove Estates*, 389 F.Supp. 602, affirmed in part, reversed in part, 526 F.2d 1293, D.C. Florida, 1976, and C.A., 5th Cir., 1976; *Tatum v. Blackstock*, 319 F.2d 397, 5th Cir., 1963.

VI.

"Navigable water of the United States" is not subject to private dominion or control, and the public has a servitude of navigation thereon. *United States v. Appalachian Elec. Power Co.*, 61 S.Ct. 291, 307-308 (1940); *United States v. Willow River Power Co.*, 65 S.Ct. 761, 766-767 (1945); *United States v. Twin City Power Co.*, 76 S.Ct. 259, 261-262 (1956); *United States v. 421.715 Acres, etc.*, 53 F.Supp. 143, 148, N.D.-Cal. (1943).

[iii]

[iii]

STATEMENT OF THE CASE

Vermilion Corporation, Lessee from Exxon Company of a large portion of the Louisiana Wetlands in Vermilion Parish (including lands from the Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre on the East to Rollover Bayou on the West) brought suit in Vermilion Parish against appellants Vaughn, Broussard and Broussard, alleging that appellants had "trespassed" on the plaintiff's leasehold via using plaintiff's canal system developed by plaintiff and its predecessors in title on the leasehold, and by fishing and shrimping therein, all without permission of the appellee.

Defendants answered, pleading in the main that these canals are "navigable waters of the United States", and that, under both federal and state law, the public has a paramount easement of use thereof, and that the canals are thus not subject to private dominion, ownership or control. The cases, being virtually identical, were consolidated.

Appellee filed a Motion for Summary Judgment in the Trial Court, and, in reasons filed on June 7, 1977, the Honorable Judge Babineaux granted the summary judgment, holding, in effect, that the canals on the leasehold are private, privately owned, and subject to private control. Judgment pursuant thereto was signed on 22 June 1977. Motion and Order for Appeal was signed on the same date, and this appeal was timely perfected.

The appeal of Judge Babineaux' granting of the Vermilion Corporation's Motion for Summary Judgment is thus before Your Honors.

[iv]

SPECIFICATIONS OF ERRORS

I.

The trial court erred in finding that there was no genuine issue of material fact, and in thus granting the Motion for Summary Judgment.

II.

The Trial Court erred in finding that the Vermilion Corporation was entitled to recover as a matter of law, insofar as the Trial Court held that, as a matter of law, the "Humble Canal System" constituted a system of private waterways, subject to the private ownership, dominion and control of Exxon and its Lessee, Vermilion Corporation.

[v]

ISSUES

I.

Was there genuine issue of material fact?

II.

Are the Humble Canals navigable in fact, and subject to tidal fluctuations?

III.

Are the Humble Canals "navigable waters of the United States?"

IV.

May a private party exercise ownership, dominion and control over navigable waters of the United States under either state or federal law, if those waterways were developed with private funds and are on private property?

[1] [1]

[1] ARGUMENT

MAY IT PLEASE THE COURT:

The three consolidated lawsuits which gave rise to this appeal were brought by the Vermilion Corporation in the 15th Judicial District Court for Vermilion Parish. Vermilion Corporation is the Lessee of certain lands in Vermilion Parish which are owned by Exxon Company, U.S.A. and which lands are delineated in Exhibits D1, D2 and D3 of the deposition of John Donohue, Chief Executive Officer of the Vermilion Corporation, which is a part of the record in this proceedings, and which was submitted both in support of and in opposition to the Motion for Summary Judgment filed below.

Generally speaking, these lands run from the Intracoastal Canal and Schooner Bayou on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre Canal on the East to Rollover Bayou on the West. Pecan Island is more or less in the center of the leasehold.

The Vermilion Corporation alleged in its pleadings that the defendants, by using certain canals dug and developed by the Vermilion Corporation and its ancestors in title on the leasehold, and by fishing and shrimping therein, "trespassed" on the lands of the Lessee. Appellee demanded injunctive relief against said trespass, and damages for the severance of shrimp by the appellants from its waterways.

Defendants answered and alleged principally as their defenses that they, as members of the public, had a paramount servitude or easement of use over and across these canals, as the canals are navigable in fact, are subject to tidal fluctuation, and are thus "navigable waters of the United States," which are not subject to private dominion or control regardless of the purpose, by whom, and where they were developed. Furthermore,

[1] [2]

both federal and state statutes prohibit the obstruction of the "navigable waters of the United States" and "highways of commerce." See 33 U.S.C. 403 and L.S.A.-R.S. 14:97.

[2] The Vermilion Corporation then filed a Motion for Summary Judgment, admitting the truth and validity of the majority of plaintiff's factual allegations. [1] Indeed, the only significant factual allegation made to date by appellants which Vermilion Corporation did not admit was that, in the development of the private canal system on the leasehold, Vermilion Corporation's ancestors in title had in fact impaired and virtually destroyed the navigability of natural navigable waterways [Fresh Water Bayou, for example] which prior to the development of the canal system had been used by residents of the Pecan Island area as actual and very vital highways of commerce. Vermilion Corporation presumably does not deny that Freah Water Bayou was formerly used as a highway of commerce; it simply denies that its actions had anything to do with rendering that Bayou unsuitable for such activity now.

Judge Babineaux, relying primarily on the opinion of this Court in *Audubon Society v. White*, 302 So.2d 660, erroneously, appellants submit, granted the Motion for Summary Judgment.

Appellants verily believe that, regardless of *Audubon Society v. White*, there was genuine issue of fact which should have precluded the granting of summary judgment.

Perhaps most important appellants also believe, to put it bluntly, that Your Honors' decision in *Audubon Society v. White* was and is erroneous, and flies squarely into the face of

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1 See pp. 6-7 for a recitation of the facts as to which the parties agree.

[2] [3]

the federal law in this area, which is both superior to state law by virtue of Article 1, Section 8, Clause 3 of the Constitution of the United States, and also is in wholesale disagreement in its jurisprudence with the principles set forth by this Court in *Audubon Society v. White.*

I.

SUMMARY JUDGMENT - WAS THERE GENUINE ISSUE OF FACT?

Before examining the substantive and truly important factual and legal considerations in this matter, one should first examine whether or not there was in any respect "genuine issue of material [3] fact" between the parties which should have been sufficient to preclude the Trial Court from the granting of summary judgment.

L.S.A.-C.C.P. Articles 966 through 969, and numerous cases; *Laufer v. Touro Infirmary*, 334 So.2d 541, *Savoy v. Action Products Co.*, 324 So.2d 921, and *Rosen v. Capital City Press*, 314 So.2d 511, dictate that the remedy of summary judgment must be used cautiously. It is no substitute for trial. It requires the resolution of all doubt concerning dispute as to issue of material fact in favor of trial on the merits. It can be granted only when the mover is clearly entitled thereto. Despite the feeling of the Court in any particular case that the party against whom a Motion for Summary Judgment is brought has little chance to prevail at trial, the motion simply must be denied if there is nevertheless "genuine issue of material fact" present in the lawsuit.

The Vermilion Corporation, through the deposition of its Chief Executive Officer, Mr. John Donohue, and through its representations to the Trial Court in brief and argument, admitted the validity of most of the factual allegations made by

[3] [4]

plaintiffs. But, as is quite evident from Mr. Donohue's deposition, particularly when same is compared with the affidavits of the appellants which were submitted in opposition to the Motion for Summary Judgment, there was one very large area of disagreement on the facts between the parties: The defendants claim, and believe they can prove at trial, that, at the time of and long before Humble et al began to develop canals in the affected area, there were *natural* waterways [particularly Fresh Water Bayou] which coursed from Pecan Island southerly to the Gulf of Mexico which were used by the denizens of Pecan Island as highways of commerce in the most literal sense–the U. S. Mail, cattle, groceries, and other stores were taken from and brought to Pecan Island by these natural navigable waterways. Defendants contend that the navigability of these natural navigable waterways, particularly Fresh Water Bayou, and another small body of water near the present DeWitt Canal and formerly called "Little Rollover" or "Little Fresh Water" Bayou, were impaired and virtually [4] destroyed *at the time of and as a direct result of* the development of the artificial canals by the then Humble Oil and Refining Company.

Even one of the cases cited by the Vermilion Corporation and by Judge Babineaux in support of summary judgment [*Ilhenny v. Broussard*, 135 So. 669] indicates that such evidence is an important consideration in a case of this type. Furthermore, LSA-R.S. 14:97 and 33 U.S.C. 403 may well have been violated, and may well have continued to be violated, by the builders of these artificial canals, if, at the very beginning of the development of the artificial canals, a natural navigable waterway was impaired or destroyed, and continues to be impaired or destroyed wholly or substantially as a result of the development of artificial navigable waterways.

To place this issue in its most salient light, proof by the defendants that Fresh Water Bayou's navigability was impaired or destroyed only by the development of Humble's, thence

Exxon's, thence Vermilion Corporation's private canals, would mean not merely that the plaintiff-appellee had developed *ab initio* artificial navigable waterways, which *became* "navigable waters of the United States," but actually *substituted artificial* navigable waterways for a *pre-existing natural* system of navigable waterways. If that were true, certainly under no circumstances could the mere passage of time bestow upon the plaintiff's artificial navigable waterways the status of "private property."

Judge Babineaux seemed frankly to feel that this strongly contested factual issue between the parties had nothing to do with his decision in this case. Appellants believe it did as a matter of federal and state statutory law, and further as a factor which strongly distinguished [1] the present case from *Audubon Society v. White*, assuming arguendo for the moment that *Audubon Society v. White* was a correct decision on its own facts.

Furthermore, although the writer and counsel for the Vermilion Corporation, due to their basically pleasant and [5] cooperative natures, were able early on to agree substantially as to many of the important facts in this matter, one should also note as a general proposition that this litigation is simply too important to be decided based upon one deposition, an affidavit, two sets of pleadings, and that which counsel for the parties informally advised the Court as to the nature of the facts. One speaks in this case of a violation clash between two very powerful principles: On the one hand, there is the sanctity of private property; on the other, the equally sacrosanct and equally ancient principle of the public right of navigation of marine highways of commerce.

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1 See discussion of this distinguishing factor at p. 10.

The Louisiana wetlands are crossed and paraphed with many artificial canal systems. It would probably come as a great shock to the developers of some of those canal systems that they are "navigable waters of the United States" subject to a public right of navigation. It would also come as a great shock to the members of the public who exercise that right of navigation to be told that these canals are "private property." The reason both sides would be so shocked is that there simply has not been a lot of thinking and effort devoted in our state to this clash of interests. With the exception of a few cases, the interests have simply coexisted - neither has bothered the other in many areas, while both probably confidently felt that either could tell the other at any given time "where to get off."

The exact configuration and unitariness of the Humble Canal System involved in this litigation, and certainly the exact history, geography and hydrography present in the areas involved in this litigation, might dictate a result different from that which on the surface would seem to be an identical situation in another area of our state, but which, upon delving into all the facts, would be distinguishable. Do not all of us in this case, judges and counsel for the parties, owe to ourselves and to our judicial institution a full development of all facts thought to be relevant, so that a definitive decision can be reached? [6] Stated differently, is not this case simply too important to be decided via Motion for Summary Judgment?

In summary, there was "genuine issue of material fact" discernible even at the early stage of development of this case at which Judge Babineaux considered the Motion for Summary Judgment. The issue of fact concerning the *natural* navigable waterway history of the area, plus the alleged impairment or destruction thereof via the development by plaintiff's ancestors of its artificial waterway system, was enough in and of itself to preclude Judge Babineaux' granting summary judgment. On a less technical, but ultimately more important, basis, Appellants

also believe that this case generally is simply too big, too complex, and too important to many persons and interests in the State of Louisiana to have been decided by the Trial Court via summary judgment, and on the basis of the small amount of material which was before the Court at that time.

II.

WAS THE VERMILION CORPORATION ENTITLED TO RECOVER AS A MATTER OF LAW - MAY A PRIVATE CANAL, DEVELOPED ON "PRIVATE PROPERTY, WITH "PRIVATE" FUNDS, BECOME "NAVIGABLE WATER OF THE UNITED STATES," THUS TO PRECLUDE PRIVATE CONTROL AND DOMINION, AND THUS TO GIVE THE PUBLIC AN EASEMENT OF USE?

The following recitation includes all or virtually all of the factual background of this litigation on which the parties are literally in agreement:

As Mr. Donohue's deposition shows, at various times from the early 1940s to the present, the Vermilion Corporation and its ancestors or allied corporations [Louisiana Fur Company, Humble Oil and Refining Company, and Exxon Company, U.S.A.], have built canals on the leasehold. The canal system is unitary; i.e., no part of it is enclosed on both ends of any particular waterway, and the canal system generally speaking connects at the four points of the compass with what are unquestionably navigable waters of the United States, to-wit: The Gulf of Mexico, Fresh [7] Water Bayou Canal, the Intracoastal Waterway, etc. The canal system generally was built to specifications of channels approximately 60 feet wide and 8 feet deep - some more, and some less, but the average width and depth are as aforesaid. The entire unitary canal system of course was built on private property with private funds. But, more important, the entire canal system is clearly

subject to tidal fluctuation, and is clearly navigable in fact. All parties agree on these conclusions.

Dredges, drilling barges, work boats, cargo boats, pleasure boats, pirogues, shrimp and fishing boats, and the proud vessels used by many members of the South Louisiana bench and bar during hunting season, now ply, and for many years have plied, the waters of these canals. As is evident from Mr. John Donohue's deposition, there are now and have been for many years, two commercial marinas at different points on the Northern headwaters of the canal system–Hazel's Landing and Broussard's Landing have long served Humble and Exxon, fishermen and hunters, and those who desired simply to have a place to launch their boats, navigate a few miles and thence debouch into the Gulf of Mexico.

A body of water is "navigable water of the United States" it is is presently being used or is suitable for use for transportation and commerce, or if it has been so used or was suitable for such use in the past, or if it could be made suitable for such use in the future by reasonable improvements, the true criterion of navigability being the capability rather than manner and extent of use, and lack of commercial traffic being no bar to the conclusion that the waterway is navigable where personal and private use of boats demonstrates the availability of the waterway for the simpler types of commercial traffic; furthermore, the presence of tidal fluctuation in a body of water, and its opening onto or having access to the open sea, are criteria for determining whether or not it is "navigable water of the United States." *United States v. Cannon*, 363 F.Supp. 1045. District Court, Delaware, 1973; *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, D. C. Delaware, 1973; *United States v. Underwood*, 344 F.Supp. 486.

[8] Thus, Humble Canal System is:

(a) Unitary;

(b) Connects on its North, East and South sides with obvious navigable waterways [Intracoastal Canal, Fresh Water Canal, and the Gulf of Mexico];

(c) Rises and falls with the tides;

(d) Is "navigable in fact," and

(e) Is thus, by anyone's definition, "navigable water of the United States."

Yet, Appellants, as citizens and members of the public, were told by the Trial Court that they cannot use those waterways without the permission of their "private owner." An analysis of the reasons for the decision of the Court below will, Appellants submit, show how and why the Trial Court erred it its appreciation of the law.

Judge Babineaux relied upon this very Court's decision in *Audubon Society v. White*, 302 So.2d 660, and also to a certain extent upon *Ilhenny v. Broussard*, 135 So.2d 609, and went on to say:

> "To support their position that the impairment of the navigability of a natural water is an issue material to this case, the defendant cites *Ilhenny v. Broussard*, 135 So. 609 (Sup. Ct. 1931). Although the Court in that case does note that there is 'some authority' for the proposition that the public is entitled to the use of a new canal which obstructs a navigable waterway, it ultimately rejects that authority, and denies the defendant the right to use a privately built canal.

> "The facts this Court feels are important are that the canals were constructed with private funds on private property; that the canals have been maintained privately and the use thereof has been restricted use with permission only; and, there are numerous trespass signs indicating the private nature of the canals involved.
>
> [9] "We distinguish *D'Albara v. Garcia*, 144 So.2d 911, and *Discon v. Saray*, 265 So.2d 765, as did the Third Circuit in *National Audubon Society v. White*, 302 So. 765 660, by noting that those cases found that the waterways involved were either part of the public domain or had been dedicated for the public use. In the case at hand we find the canals are privately maintained and have not been dedicated for the public use.
>
> "We find that the Third Circuit's statement of the law in *National Audubon Society v. White* and the Supreme Court's decision in *Ilhenny v. Broussard* are controlling; and even taking the allegations of defendant, that the canals have obstructed or diverted 'navigable waters of the United States' we must conclude that navigable waterway constructed with private funds on private land is a private thing and not open for public use." (Emphasis and underscoring theirs)

With apologies to Judges Hood, Culpepper and Miller, Appellants believe that *Audubon Society v. White* is simply an erroneous decision in all respects, as it stands for a proposition which Appellants believe cannot be countenanced under the Constitution and laws of the United States. *Audubon* seems to say that a waterway can be "navigable," and presumably can be "navigable waters of the United States," but if developed on

private property with private funds, is nevertheless subject to private dominion and control. Perhaps the writer is simply unaware of the law applicable to this matter, but, again with apologies to the *Audubon* Judges, the writer believes that they created in *Audubon Society v. White* an anomalous legal status via the attempted marriage of two mutually exclusive legal principles: There is no *private* "navigable water of the United States" as the writer appreciates the law; private dominion and control simply cannot be married to the public right of use of "navigable water of the United States."

A reading of *Audubon* shows, Appellants believe, that the real issues which should have been litigated by the parties in the Trial Court and which should have been dealt with by the Appellate Court were not addressed. *Audubon* was tried as if it were a road dedication case. No one raised apparently the many issues of federal law applicable to waterways which do not apply [10] to questions and cases involving dedications of roads, and of normal rights of way over land.

Furthermore, Your Honors will note that, at Page 662 of the *Audubon* opinion, the Court said:

> "The canal has been . . . widened since it was originally built, and it is now from 88-110 feet wide, and 9 to 11 feet deep. It is navigable and has been navigable since it was first built in 1912. *There were no navigable waters on the land affected by the canal before that waterway was constructed.*" Ibid. [Emphasis supplied].

One should remember that in this case, the one large factual issue in dispute between the parties concerns the pre-existence of natural navigable waterways on the Vermilion Corporation's leasehold and the impairment or destruction thereof via the building of the artificial canal system. Presumably, this Court

felt that the absence of such an issue, or of such proof, in the *Audubon* case was important. Presumably, also, if Appellants are able to prove at a trial on the merits of the instant case that the artificial canal system presently in question was born itself only via destruction of a natural system of navigable waterways, the result, even under the authority of the *Audubon* case - even if it is correct - might well be different. Appellants will leave that distinguishing factor to Your Honors own consideration, for Appellants desire to concentrate on that which they really believe to be wrong with the *Audubon* case, and right about their position in the instant litigation.

The fact that the Humble Canal system involved in this case was developed on private property with private funds is, Appellants believe, of no moment, for the law both of the State of Louisiana and of the United States shows that, even though manmade channels and canals be constructed on private property with private funds, if they then or thereby become navigable, and otherwise connect with clearly navigable bodies of water, they become "navigable waters of the United States," and, pursuant to provisions of the United States Constitution, U. S. and [11] Louisiana jurisprudence, and statutory authority, they become public highways of commerce, not subject to private dominion or control and instead open to public use.

The United States has paramount control over navigable waters under the Commerce Clause of the Constitution of the United States (Article 1, Section 8, Clause 3). The dispositive effect of this principle upon this case is discussed *infra*, but, before doing so, the Court should be aware of the following principles:

(a) Under state law, a private party may not obstruct passage on a "highway of commerce" (R.S. 14:97);

(b) Under federal law, a private party may not pose or place *any* obstruction (whether statutorily delineated or not) to the "navigable capacity" of the navigable waters of the United States (33 U.S.C. 403, and *United States v. Republic Steel*, 80 S.Ct. 884).

(c) Fishes and shrimp are not subject to private ownership or control (R.S. 56:311-312);

(d) Most important, the federal law, as is indicated in the *Sexton* case, and the state law, as was indicated by our Supreme Court in *Discon v. Saray*, [1] stand clearly for the proposition that, although a canal be developed with private funds on private property, if these canals be navigable in fact or subject to tidal fluctuation, and otherwise connect with that which is undisputed navigable water of the United States, "these canals themselves become navigable waters of the United States." *United States v. Sexton Cove Estates*, 389 F.Supp. 602, affirmed in part, reversed in part, 526 F.2d 1293, D.C.Florida, 1976, and C.A. 5th Cir. 197_

In *Discon v. Saray*, the Court discussed the facts and some of the law applicable to this matter in the following language:

> [12] "Plaintiffs urge that the obstruction of navigable waterways is reprobated by R.S. 14:97 [2] and

---

1 See also the older *D'Albora v. Garcia*, 144 So.2d 911

2/ "Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, naviable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.

"Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both.

> that under this provision, as applied by the Court of Appeal, Fourth Circuit, in D'Albara v. Garcia, La. App., 144 So.2d 911 (1962), cert. den., to another canal bordering Lake Pontchartrain, the action of the defendant is prohibited.
>
> "The Court of Appeal found that Faciane Canal is a navigable waterway, and that the defendant owns that part of the waterway running through his property. It held, however, the right of the plaintiffs to use the waterway constituted merely a servitude of passage which, under the provisions of Civil Code Arts. 703 and 777, may be changed to another location by the owner of the servient estate: and that, since the defendant has offered for the use of plaintiffs another, different canal by which they will have navigational access through his property, he has satisfied the provisions of the cited Civil Code articles. For these reasons, it concluded that plaintiffs were without right to maintain their action to prevent defendant from closing Faciane Canal where it goes through his property in order to give him a better utilization of his land.
>
> "We understand from the record that Faciane Canal was constructed in the mid-1950's. It was included in a subdivision development known as the North Shore Beach Subdivision. The 168 lots therein (each 100 feet in width) lie along the edge of Lake Pontchartrain. The Canal and a road designated as Carr Drive are shown on the subdivision plat to the rear of the lots and roughly parallel to the shore of the lake. The Canal and roadway are approximately three and one-half miles long. Access to the lake is available through only one end of the canal, the other end running into the Southern Railway tracks.

"The defendant owns the property on both sides of the canal where the canal enters the lake, and desires to fill in the canal at that point for almost 700 feet, in order to have [13] direct access to his property on each side. For convenience we attach hereto that portion of the subdivision plat (a survey conducted by F.C. Gandolfo, Jr., dated September 23, 1954), which shows the area where the canal enters the lake and where defendant proposed to close the canal. The part of the canal between the 'x's' (which we have placed on the plat) is the area where the witnesses at the hearing estimated that the closure was attempted.

"We entertain no doubt but that the lower courts were correct in their conclusion that the canal is navigable. It is fifty to sixty feet wide, and wider in some areas. Witnesses estimated its depth as being between ten to fifteen feet. Boats up to thirty or thirty-five feet in length regularly use the canal and larger boats have used it from time to time. Principally these boats belong to the owners of the abutting property and are used for pleasure purposes. However, floating pile drivers and barges have also been in the canal in connection with the construction of boat houses and piers. Indeed, it appears to be conceded in defendant's brief that the canal is navigable in fact. However, defense counsel argue that it is not navigable in law because there is no commercial traffic thereon, and that since the abutting property is restricted to residential use there will be no commercial use of the canal.

"We find that the record does not bear out this contention. As shown, the canal has been used by commercial floating pile-drivers and barges. And that part of the canal abutting the defendant's property,

which is commercially zoned, has been used commercially as a rented dock for crew boats used in oil operations. (The first six lots which are owned by defendant are zoned for commercial purposes.)

"In any event we think that the court in D'Albora v. Garcia, supra, correctly stated that:

' *** the capability of use by the public for purposes of transportation and commerce affords the true criterion of navigability rather than the extent and manner of use. Economy Light & Power Co. v. United States, 256 U.S. 113, 122, 123, 41 S.Ct. 409, 412, 65 L.Ed 847; United States v. The Montello, Etc., 20 Wall. 430, 22 L.Ed. 391. Nor, as was pointed out in United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243, does the lack of commercial traffic preclude a conclusion of navigability where personal or private use by boats demonstrates the navigability of the stream for a type of commercial navigation. * * *

'It was particularly pointed out in the United States v. Appalachian Electric Power Co. case, supra, that the condition of exploration and settlement of an area explained the infrequency or limited nature of such use of waters as highways of commerce, and that the lack of commercial traffic does not preclude the [14] conclusion that a body of water is navigable where personal or private use demonstrates the capability of the stream for a type of commercial navigation; the question of the availability of the body for navigation is controlling rather than the extent of commerce conducted thereon. A similar observation was made by the Louisiana Supreme Court in State v. Jefferson Island Salt Mining Co., supra.'

[14]

"Inasmuch as we have found that the canal is navigable on the basis of other evidence, we do not deem it necessary that it be determined whether it is subject to tidal e-b and flow (which concededly is one indicia of navigability). But because of defense counsel's heavy reliance on this factor as distinguishing this case from D'Albora, we have examined the record to find whether it sustains their assertion that, unlike the canal in D'Albora, the Faciane Canal is not affected by a regular ebb and flow of the astronomical tides (as distinghished from the wind tides). The meteorologist who testified for defendant on this point did not testify that the *Faciane Canal*, as distinguished from Lake Pontchartrain, is not so affected, he testified that none of *Lake Pontchartrain* is subject to an atmospheric or astronomical tide. He did state, however, that if tide is considered as an ebb and flow that then there was an ebb and flow in the lake. He haye no testimony in this regard applying specifically to the canal. On the other hand, witnesses who have spent considerable time on the canal testified that there is a daily ebb and flow in the canal of eight to ten inches. In other words, the canal *is* affected by an ebb and flow in the same manner as is the lake and in the same fashion as the canal involved in D'Albora.

"Hence, because the canal is navigable, there can be no question but that it is subject to the provision of R.S. 14:97.

"Manifestly, the complete blockage of the canal by defendant where it passes his property not only renders 'movement thereon more difficult,' (R.S. 14:97), it renders movement thereon impossible." [Emphasis theirs]. 265 So.2d 765, 767-770.

[15]

In *United States v. Sexton Cove Estates, supra*, the following language may be found:

"In the case at bar, the defendants' canals denoted as numbers one (1) through five (5) are tidal and are connected to Blackwater Sound, a navigable water of the United States. The five unopened canals also have tidal fluctuations. Thus, these canals affect the nearby navigable waters; i.e. waters of Blackwater Sound are diverted into the canal systems with the tidal fluctuations and (anoxic, polluted) waters from the canal system are returned to Blackwater Sound; any of these alter or modify the course, location, condition or capacity of Blackwater Sound as a matter of law:

[15] *Any excavation or filling operation must necessarily 'alter' or 'modify' the body of water which is its subject.* United States v. Benton and Company, Inc., 345 F.Supp. 1101, 1102 (M.D. of Fla. 1972). (Emphasis added).

"The Fifth Circuit in Tatum v. Blackstock, *supra*, also holds clearly that man-made channels connecting with tidal waters become navigable waters of the United States notwithstanding that they are on private property. The Court stated:

" . . . At the point where plaintiff's property and other property in the subdivision join this low tidal flat, a *man made channel* has been dug running from the channel of Taylor Bayou on the west in an easterly direction ane forming the south and east boundaries of the tidal flat, connecting with Taylor Lake. Thus the area is now completely surrounded by navigable water and in effect what was a peninsula is

> now rendered an island by the cutting of the *man made channel, and the channel is navigable water of the United States.* Tatum v. Blackstock, Id., 319 F.2d at 398." (Emphasis theirs).
>
> *United States v. Sexton Cove Estates,* 389 F.Supp. 602, page 607.

That which is "navigable water of the United States," under the authority of a legion of federal cases, is not subject to private dominion or control, as the public has a paramount right of use therein. *United States v. Appalachian Elec. Power Co.*, 61 S.Ct. 291, 307-308 (1940); *United States v. Willow River Power Co.*, 65 S.Ct. 761,766-767 (1945); *United States v. Twin City Power Co.*, 76 S.Ct. 259, 261-262 (1956); *United States v. 421.715 Acres, etc.*, 53 F.Supp. 143, 148, N.D.-Cal. (1943). In *United States v. 412.715 Acres, supra,* it was said succinctly

> "It is well established that title to the banks and bed of a navigable stream are subject to the navigation servitude. The nature of the servitude is defined by cases cited in the Government's brief: 'The public right of navigation'. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 33 S.Ct.679, 57 L.Ed. 1083; Scranton v. Wheeler, 179 U.S.141, 21 S.Ct. 48, 45 L.Ed.126; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S.Ct.667, 57 L.Ed. 1063. The shores and lands lying under navigable waters are held to be subject to a trust for the public uses of navigation and fishery. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large. Stockton, Atty. Gen. of New Jersey, v. Baltimore & N.Y.R. Co., C.C., 32 F.9. A waterway was designated the 'greatest public utility' in Hawkins Point Light-House Case,

> C.C., 39 F.77,88. [16] The court in that case also said that 'The bed of a navigable river remains subject to an easement of navigation.' In controlling, improving and regulating the navigability of waters the Government traditionally acts for the benefit of the navigating public. Unquestionably, it may deepen channels, widen streams, erect and make similar improvements, without compensating the owners of land subject to the navigation servitude."

The writer frankly finds it very difficult to see how, *Tatum, Sexton Cove Estates,* and the immediately foregoing quotation can simply be ignored by the courts of our state. All of us know that commerce, navigation, and the admiralty are in the end peculiarly the province of the United States, and not of the states. That is no new or revolutionary principle. Furthermore, 33 U.S.C. 403, which prohibits "obstruction to the navigable capacity" of navigable waters of the United States, and the line of jurisprudence reflected in *Tatum* and *Sexton Cove Estates* are also not new or revolutionary.

We hope that this Court will agree with and recognize the error which we feel was made by this Court in *Audubon* and perpetuated by Judge Babineaux: The concept of "dedication to public use" is a creature of state law as applied to landslide roads. The federal, and, in the main, our state jurisprudence, simply cannot and does not speak of waterways in the same frame of reference. *D'Albora v. Garcia,* 144 So.2d 911 and *Discon v. Saray, supra,* certainly mention "dedication to public use," whether it be by subdivision plat or otherwise, but they also prominently mention the much more and truly important legal principles which were involved in both of those cases and which should have been involved in *Audubon*: Once one proves navigability in fact and navigability in law, that ends the inquiry with regard to waterways; one does not have to, and should not be required to, go beyond that point and prove some sort of "dedication."

It makes not a whit of difference that Mr. Donohue and others have put up "No Trespassing" signs, and have not "dedicated" their canals to public use. *The fact that Vermilion* [17] *Corporation and its ancestors in title built navigable canals, and tied those canals into other clearly navigable bodies of water made those canals from the day of their completion "navigable water of the United States," and neither the Vermilion Corporation nor anyone else, save the government of the United States by its laws, can tell a member of the public that he or she may not navigate those canals.*

We hope that this Court will not only reverse the judgment of the Trial Court, but will indicate clearly and strongly in this opinion the applicable legal principles which must govern this matter, and we further hope that the Court will agree with the undersigned that those principles are as set forth in 33 U.S.C. 403, LSA-R.S. 14:97, *Discon v. Saray, D'Albora v. Garcia*, and, most important, *United States v. Sexton Cove Estates* and *Tatum v. Blackstock.*

Respectfully submitted,

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John Hill
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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum has been duly mailed to counsel for Plaintiff-Appellee, Mr. Charles R. Sonnier, P.O. Box 519, Abbeville, Louisiana 70510.

Lafayette, Louisiana, August 8, 1977.

/s/ John Hill
JOHN K. HILL, JR.

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NOS. 6258, 6259, 6260

VERMILION CORPORATION

PLAINTIFF-APPELLEE

VERSUS

NORMAN VAUGHN, FREDDIE BROUSSARD
AND LARRY J. BROUSSARD

DEFENDANTS-APPELLANTS

APPEALED FROM THE 15TH JUDICIAL DISTRICT COURT, VERMILION PARISH, LOUISIANA, HONORABLE ALLEN M. BABINEAUX, PRESIDING JUDGE.

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE VERMILION CORPORATION

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SYLLABUS

I.

The plaintiff may move for a summary judgment in his favor for all or part of the relief for which he has prayed, with supporting affidavits, at any time after the answer has been filed. The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to material fact and that mover is entitled to a judgment as a matter of law. L.S.A.-C.C.P. Article 966-969.

II.

A canal built entirely on private property, with private funds and for private purposes, is a private thing, for the same reasons that a road built on private property for private purposes is a privately owned road, regardless of whether or not the canal is navigable, and despite the fact that there may be a natural tide in the canals. The owners therefore have the right to regulate and control the use of the canals, including the right to prohibit defendants from using it. *National Audubon Society v. White*, 302 So.2d 660, 3rd Cir., 1974. *Ilhenny v. Broussard*, 135 So. 669, Sup. Ct., 1931. *Harvey v. Potter*, 19 La. Ann. 264, Sup. Ct., 1867.

[1]

[1]

STATEMENTS OF FACTS

Appellee is the lessee of and is in possession and control of certain lands in Vermilion Parish, Louisiana, described in Exhibits "A", "B", and "C" attached to the original petition which is filed in the record. (Maps showing the property are attached to the deposition of John Donohue, which is also part of the record of these proceedings.) There are numerous canals on the property which are used as the primary means of transportation from one point to another within appellee's leasehold. They are also used by sub-lessees and other persons with written permits from appellee.

These canals were constructed by the present owner and its ancestors in title, exclusively with private funds. Since the canals were built, their use has been continuously supervised and controlled by appellee, and by appellee's lessor and its ancestors in title. There are numerous "No Trespassing" signs posted alongside the canals throughout the entire leasehold. Appellee has subleased almost all of the property to duck hunters, commercial fishermen, trappers, and others, through written leases and hunting permits. The right to use the canals is granted with the sublease.

The appellants have on repeated occasions and after due warnings from appellee and its employees, engaged in commercial fishing and/or shrimping activities on the canals within appellee's lease, without permission of appellee. (See the affidavit of Warden Murphy Sellers which is filed in the record.) Appellants do not contest the fact that they were in the locations as alleged in the original petition. However, appellants do contest appellee's right to prohibit them from engaging in commercial fishing and/or shrimping, or otherwise using said canals within appellee's leasehold.

[1] [2]

Appellants admit that the canals are wholly upon private property, and were constructed exclusively with private funds. It is not contested that appellee has maintained control of the use [2] of those canals continuously for many years, has maintained a multitude of "No Trespassing" signs posted along the canals throughout appellee's leasehold, and has granted permits to many hunters, fishermen, and other sportsmen to use the canals.

Appellants are correct in stating that many proud vessels used by members of the Louisiana Bench and Bar during hunting season have "plied" the waters of these canals, however they failed to mention that no plying was done without a permit from appellee. When what is known as the Freshwater Bayou was widened and improved, the U. S. Corps of Engineers secured a servitude from appellee and from the owners of the property.

On the other hand, appellee admits readily that the canals are capable of being navigated for certain uses, and are subject to the tides to some degree. Therefore, as alleged in the motion for summary judgment, there are no real material questions of fact presented in these law suits. Rather the issue is whether or not appellee has the legal right to continue to control the canals within its lease.

These three consolidated suits were filed by appellee, Vermilion Corporation, requesting injunctions to restrain and prohibit defendants, Norman Vaughn, Freddie Broussard, and Larry J. Broussard from trespassing on any and all property and/or private canals under lease to appellee.

Appellants first removed the three suits to Federal Court, but they were remanded to the Fifteenth Judicial District, Parish of Vermilion after the Federal Court failed to find that the suits presented a Federal question. The defendants then

[2] [3]

filed a separate suit in Federal Court against appellee requesting an injunction which would stay the State Court proceedings. Those suits have been dismissed voluntarily by appellants.

Appellee filed a motion for summary judgment on the request for an injunction against the three defendants, together with affidavits of Murphy Sellers, a Vermilion Corporation Warden, and John Donohue, an officer of the corporation. Mr. Donohue's [3] deposition was also included. The trial court found that there were no genuine issues of material fact, and rendered summary judgment granting appellee the injunction requested.

[4] ARGUMENTS AND LAW

MAY IT PLEASE THE COURT:

Appellants listed in their specification of errors two principal contentions, which are the main issues to be decided on this appeal. Appellants first claim that the trial court erred in finding that there was no genuine issue of material fact. Secondly, appellants argue that the trial court erred in finding that appellee's canal system constitutes a system of private waterways, subject to private ownership, dominion and control.

Appellee and appellants are in general agreement as to the facts that are genuinely material to this case and upon which a judgment can be rendered. It is clear then that the canals in question were built exclusively on private property and with private funds. Appellee has been in control and has continuously supervised the canals since they were built. The canals are navigable and are subject to the tides to some degree. It is also not contested that the appellants did in fact engage in commercial fishing and/or shrimping activities in said canals without permission. Appellee contends that these are all the material facts which the trial court needed to render its judgment.

Even appellants in their brief admit that the facts are not disputed. Appellants stated in page two of their brief that the only significant allegation made by appellants which is not fully agreed to is appellants' claim that the initial construction of the canals over thirty years ago impaired previously existing natural waterways. The court should note that this "factual allegation" was not specifically pleaded as an affirmative defense in the answers filed by appellants.

Appellee has maintained the position in the trial court, and continues to maintain the position that even if this allegation were proven, it is not material to the outcome of this lawsuit,

and therefore the trial court was correct in making its decision.

[5] Appellants in their brief did not cite any authority supporting their claim that if previously existing natural waterways were affected, the owner of private canals loses his ownership or control. Thus, none of the law cited in brief indicates that the allegation is material or that it would affect the outcome of this lawsuit.

Appellants state that the Supreme Court opinion in *Ilhenny v. Broussard*, 135 So., 669 indicates that such evidence is an important consideration in a case of this type. Appellees respectfully disagree. The *Ilhenny* case also involves the right of private property owners to the ownership and control of navigable canals built with their own private funds. In that case the Supreme Court of Louisiana ruled that although the Congress of the United States may have plenary power over navigable waters of the nation, privately built canals are still subject to private ownership and control. The defendant in the *Ilhenny* case made much ado about its allegation that the privately built canal diverted water from natural channels. The Court, in its opinion stated:

> "On this testimony we are unable to say that defendant has shown, by a preponderance of the testimony, either that the natural channel is no longer navigable or that (if no longer navigable) this condition is due solely to the waters being diverted by the canal.
>
> "*But be that as it may we do not think this gives defendant the right to use the plaintiff's private canal.*" (Emphasis added.)

The court made it clear that even if the allegation were true, it does not affect the canal owners right to own and control his

[5] [6]

private canal, and thus the allegation was not material to the legal issues presented in that lawsuit. The Supreme Court concluded:

> "On the whole, therefore, we are of the opinion that defendant has not the right to use plaintiff's canal *under any circumstances* . . ." (Emphasis added.)

[6] Appellee therefore contends that even if this allegation were true, (and it was clearly admitted in appellants' brief that this was the only factual allegation not agreed to), it is still not material to the issues involved in this lawsuit. The Third Circuit discussed the *Ilhenny* case in its decision in *National Audubon Society v. White*, 302 So.2d 660, 1974 when it stated:

> "In that case E. A. McIlhenny, plaintiff's ancestor in title, sued defendant, Broussard to enjoin him from using that canal. The principal defense urged by the defendant was that the McIlhenny canal diverted so much water from the natural channel that the latter was no longer navigable, and that defendant thus had a right to use plaintiff's canal (even though a private one) because of having been deprived of the use of the natural channel. *The court held that regardless of whether the McIlhenny canal diverted waters from another channel, as contended by defendant, defendant nevertheless did not have the right to use plaintiff's private canal.*" (Emphasis added.)

Judge Babineaux correctly read and interpreted the above cited cases, and was correct in his decision that the only factual allegation which has not been agreed to was not material to his decision in this case. It would have been senseless to require the time and expense of a full trial on the merits merely to determine the truth of one factual allegation that was not material to the lawsuit.

[6] [7]

Appellants' final argument in support of their specification of error number one, is that this litigation is "too important" to be decided upon on summary judgment. This claim is obviously without merit. Appellants cited no authority which states that "important" decisions can't be made through summary judgment, nor have appellants outlined a system for measuring the relative importance of different cases.

The very purpose of a trial is to bring the facts before the court. Our Code of Civil Procedure recognizes that there are many instances when the parties are in agreement as to the material facts, but simply disagree as to what law should be applied to these facts. In those cases there is no necessity to go through the time and expense involved in a full trial simply to bring out facts which are not disputed or immaterial.

[7] Appellee will be the first to admit that this is a case of importance, however the trial court was also fully aware of that fact since this point was repeatedly emphasized in the arguments of the able and diligent counsel for appellants. The mere fact that the material facts have been agreed to rather than extracted through the trial process does not mean that the trial court can't give careful consideration to what appellants described as a "violent clash" between two principals - the sanctity of private property on the one hand and the public right of navigation of marine highways of commerce on the other hand.

The trial court was fully aware of the importance of its decision. It had all the material facts before it which were needed to make a decision, and had exhaustive briefs from each counsel concerning the issues. The court also had ample time to make its own independent research. Therefore the trial court had all the tools which it needed to carefully weigh these two important principals and to carefully consider the facts and the law involved and make its decision correctly.

[7] [8]

In summary no case is "too important" for summary judgment when the material facts are not disputed. On the contrary, the trial court should be in an even better position to render "important" decisions through summary judgment, since it does not have to spend time making decisions on complicated issues of fact or weighing conflicting testimony, but can center its attention on the principals of law involved. The court's statements in the *Ilhenny* and *Audubon* decisions make it clear that the only contested fact in this case is not material to the issue that needs to be decided. Therefore, this lawsuit was in the correct posture for summary judgment.

Appellants' second specification of error is their claim that the trial court erred in finding that the canals in question are private and subject to private ownership and control. Although appellants argued in its brief that there has not been alot of thinking in this area, the idea of private canals is not by far a [8] new one in Louisiana. Many years ago the Louisiana Supreme Court decided the same issue in the case of *Harvey v. Potter*, 19 La. Ann. 264 (1867). The issue in that case was as follows:

> "Has the proprietor of a tract of land the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal for the purposes of navigation, and to require payment for its use by all who choose to avail themselves its facilities."

The court went on to conclude that:

> "It is not easy to perceive how, in such a case, the public becomes seized of the right to the gratuitous use of advantages afforded by individual labor and enterprise. The right of expropriation, it is true, belongs to the public, and the land and the canal so

[8] [9]

> constructed upon it might, under constitutional and legal provisions, become public property, and be appropriated to public use . . .
>
> "Private property shall not be taken for public uses, without ample renumeration first made to the owner. This is a fundamental principle. So it would seem clearly to follow that private property can not be used by the public without compensation for that use. Suppose the plaintiffs, in this case should refuse to permit the defendant to use their canal, would an action of damages lie against the owner? If not, it must appear that the defendant is not entitled to require the use of the canal free of charge as he would have to require the free use of a navigable stream, or a public road."

The Supreme Court back in 1867 distinguished between what is commonly termed a navigable stream, and a privately constructed and privately owned navigable canal. At that time the court stated that the only method by which the public would have the right to use the canals is through expropriation, and in that instance the owner of the property would have to be compensated for the value of what was taken.

This may be the answer to the defendants' arguments that the canal is a navigable water of the United States, and subject to the power of Congress. Millions of dollars were spent in the construction of the canals in question. Perhaps Congress may have power over all navigable waters, whether public or private, but the Fifth Amendment to the U. S. Constitution clearly provides, [9] and it is a fundamental law of our State and Nation that private property can not be taken without just compensation. There has been no expropriation or appropriation by the Federal or State Government of these canals for public use. Congress has not chosen to exercise its power to

expropriate the canals for public use, and they are still subject to State law, which recognizes the private ownership of the canals.

Again, in the case of *Ilhenny v. Broussard*, supra, the Supreme Court recognized a land owner's right to construct, to own and to control a private canal on his property. That lawsuit was similar to the one at hand in the sense that it was an action by a property owner to enjoin a defendant from using a certain navigable canal belonging to the plaintiff. The court was of the opinion that the defendant did not have the right to use the plaintiff's canal *under any circumstances.*

The question of private ownerships of navigable canals was recently presented to the Third Circuit Court of Appeal in the case of *National Audubon Society v. White*, supra. That suit was another action for an injunction prohibiting the defendant from using a private navigable canal. The facts of that case are remarkably similar to those we are dealing with herein.

The evidence in the *Audubon* case indicated that the canal in question was constructed on private property and with private funds. The canal was navigable and used for various purposes by a multitude of persons since it was first built. There was evidence presented that it had been used for navigation by mail carriers, oil companies, cattlemen, sportsmen, hotel patrons, etc. for a period of at least fifty years, and was used often by the defendants. The owners of that canal had wardens who maintained supervision over the canal and prevented any persons from using the canal without permission. The evidence show that there were a number of signs along the canal route indicating its private nature. The canal owners had issued grazing permits and other written agreements for persons to use the canals. Even the Army Corps of Engineers had at one time obtained a permit to use the canals.

[10] The court found that the canal in question was not a public canal, subject to public use, that no right-of-way was ever expropriated by any public body for canal purposes and there had been no formal, tacit or implied dedication of the canal for public use.

Contrary to appellants contentions, the Court of Appeal did not simply treat this case as a "road dedication" case. The court carefully considered defendants' argument that navigable waters are owned by the public and are for public use. At page 665 of the decision the court stated:

> "In our Civil Code, things are classified as being either 'common or public'. L.S.A.-C.C. Art. 449. Running water, the sea and its shores are said to be *common things.* L.S.A.-C.C. Art. 450. Navigable rivers, highways and the beds of rivers, as long as they are covered with water are classified as being public things. L.S.A.-C.C. Art. 453. We do not consider the McIlhenny canal to be either a common or public thing. The canal was constructed with private funds on private property. It can not be said that the ownership of the canal 'belongs to nobody in particular', as provided in L.S.A.-C.C. Art. 450, or that title to the canal became 'vested in a whole nation' simply because it contained running water or because it was dug deep enough to become navigable.
>
> "We believe that a canal built entirely on private property, with private funds and for private purposes is a private thing, for the same reason that a road built on private property for private purposes is a privately owned road. See Vol. 2, Yianopoulos, Louisiana Civil Law Treatise, Sec. 31.5."

[10] [11]

There is no error in comparing private canals to private roads. Highways, like navigable rivers (streams) are classified as "public things", but it is well known and supported in our jurisprudence that there can be private roads subject to private ownership and control. If appellee's land were not primarily marsh land but suitable for road building, there is no doubt that appellee could have built, maintained and controlled the use of a private road system on its leasehold. The courts have likewise recognized that property owners can build, own and control navigable canals on private property. The canals are the most practical means of transportation in the marsh areas, and they are merely substitutes for private roads.

[11] The court in *Audubon* cited the Supreme Court decision of *Harvey v. Potter*, supra and *Ilhenny v. Broussard*, supra. The court concluded that the "plaintiffs have the right to regulate and control the use of that canal, including the right to prohibit the defendants from using it". The court also concluded that L.S.A.-R.S. 14:97 does not apply to a private canal, and distinguished the cases of *D'Albora v. Garcia*, 144 So.2d 911 (La. App. 4th Cir., 1962); and *Discon v. Saray, Inc.*, 262 La. 997, 265 So.2d 765 (1972), which appellants relied on in their brief. Writs to the Supreme Court were applied for in *Audubon*, but denied, the court stating at 305 So.2d 542, "on the facts found by the Court of Appeal, there is no error of law in the judgment below".

Appellants base their arguments on two Louisiana cases, *Discon v. Saray*, supra and *D'Albora v. Garcia*, supra. As mentioned above, these cases were dealt with in the *Audubon* case, and we'll not go into them any further. Appellants also cite a number of federal cases and base their main argument on their contention that these canals are "navigable waters of the United States", and thus private control over them is precluded.

[11] [12]

After a careful review of all of the federal cases cited by the appellants in their brief, it is obvious that none of those cases are on all fours with the case at hand, nor do they address the same issues. None of these federal cases dealt with the right to control private canals constructed wholly within private property and with private funds, and being continuously controlled by the owner or lessee thereof. Most of the cases dealt with the issue of whether or not parties were required to get permits from the Corps of Engineers to construct certain facilities or to engage in certain activities.

Appellants also cite 33 U.S.C.A. 403 which is a Federal Statute stating that a party cannot place an obstruction to the navigable capacity of a navigable water of the United States, without getting a Corps of Engineers permit. All of the cases under this statute deal with dredging, dumping trash in waterways, [12] or actual construction of buildings, warves, piers, bridges, etc. on waterways which are used by the public. These type of constructions affect the navigable *capacity* of the publicly used waterway. In the case at hand first of all, the waterway is not one which has been appropriated to the public use. Secondly appellees are not attempting to alter the capacity of the stream. Their capacity has been the same since they were built. Finally this statute can be compared to R.S. 14:97 which the *Audubon* court held did not apply to private canals.

Appellants directed much attention in their brief to convince the court that the canals in question are navigable, however this matter has already been agreed to. Appellant then cites many federal cases which they contend hold that since the streams are navigable they can not be subject to private control.

One of the main cases relied on by appellants is *United States v. Sexton Cove Estates*, 389 Fed. Supp. 602, 526 Fed. 2d 1293, which is a Florida case. The question in that case was whether a permit was required from the Corps of Engineers in order to

dredge canals. However the *Sexton* case is distinguishable from the case at hand, since in that case the canals in question were obviously dedicated for public use. They were built in connection with the development of a seventy-three acre mobile home subdivision, and the canals were shown on a plat which were prepared and filed in the public records in connection with the subdivision. The right to own and control the canals was not even presented to the court, the only question being whether or not a permit was required to dredge the canals.

Likewise, the case of *Tatum v. Blackstock*, 319 Fed. 2d 397, cited by appellants is another case dealing with Corps of Engineers jurisdiction. The question presented was not whether or not a private land owner could control activity on canals which he constructed with his own funds. Rather the issue dealt with whether or not a person was required to get a permit to do construction work which required building up water bottoms (a tidal [13] flat) and possibly affecting other navigable waterways. There was a "man-made channel" discussed in the decision, but the court did not state whether or not the channel was constructed with private funds and wholly within private property. It was alleged that the construction complained of affected the water levels in the "man-made channel" and other natural navigable waters around the tidal flat in question. The court did not make a decision, since it felt that any complaint was within the jurisdiction of the Corps of Engineers.

Thus the *Tatum* case does not address the issues presented in this case, and should not even be considered. In page 15 of their brief, appellants stated that the *Tatum* case stands for the proposition that man-made channels connecting with tidal waters become navigable waters of the United States notwithstanding that they are on private property. No where in the *Tatum* decision is it indicated that the lands were constructed on private property, or that they were constructed with private

funds. Simply because they were man-made does not indicate those conclusions. In addition, the specific issue of private ownership and control of privately built canals was not addressed.

Also on page 15 of their brief, appellants cite a "legion of federal cases" which supposedly states that navigable waters are not subject to private dominion and control, and the public has a paramount right of use therein. Let us examine what proposition these cases really stand for.

The first case in the legion is *United States v. Applachian Electric Power Company*, 61 Sup. Ct. 291 (1940). The issue in that case was whether or not the Federal Power Commission could require a license for the construction of a dam across the New River which ran through Virginia and West Virginia. It is obvious from reading that decision that the New River was a natural navigable waterway, and was not privately controlled, constructed and owned. The only holding in that case was that the Federal Government had dominion over the water power of the flow of a navigable stream.

[14] The next case in the legion cited was *United States v. Willow River Power Company*, 65 Sup. Ct. 761. This was an eminent domain case in which the government was expropriating private property. In that case the government had raised the water level in a natural stream, and by raising the water level three feet it reduced the power capacity of a privately owned electric plant situated on the stream. The question presented was whether or not raising the water level and thus reducing the power capacity of the electric plant constituted "taking" property so that the owner of the electric plant could be compensated for its loss. Obviously, that case has no application to the case at hand.

The case of *United States v. Twin City Power Company*, 76 Sup. Ct. 259 was also cited by appellants in its brief. This is another expropriation suit, and did not deal with a man-made stream. In this case the government appropriated property which abutted a natural navigable waterway. The riparian owners claimed that the fact that the land abutted a navigable stream, which was suitable for placing an electric plant thereon, should be taken into consideration in determining the value of the land taken. Therefore the question presented to the court was how to value the land taken and whether or not the value of the water flow in the stream should be considered. Again, it is obvious that that case is not applicable to the one at hand since the facts and issues were entirely different.

However the court in *United States v. Twin City* did cite another case entitled *United States v. Chandler-Dunbar*, 33 Sup. Ct. 667, which stated that the ownership of a private stream wholly upon the lands of an individual was possible under federal law.

The last case cited by appellants in its brief was that of *United States v. 421.75 acres, etc.*, 53 Fed. Supp. 143, which is a 1943 California case. This is another expropriation case which has no application to the case at hand. The question there was whether or not the United States Navy had to pay the defendant for [15] water bottoms taken for use as a Navy fueling yard. It is important to note that the property involved was not a privately built waterway. The court in that case held that the property could not be expropriated unless the Navy compensated the owners of the water bottom for the property taken.

In summary, this writer frankly finds it easy to see how the *Tatum*, *Sexton Cove Estates*, and the other cases cites can simply be ignored by the courts of our state. They do not deal with the issues that are presented in this lawsuit, where on the

contrary, there are Louisiana cases which are squarely on all fours with the case now before this court, and which must control. The only way the public can gain access to the free use of these canals is if they were expropriated by a governmental body, and appellees were compensated for the enormous amount of money spent in dredging and developing these canals. Therefore appellant prays that this court will continue to follow principals enunciated in the *Harvey v. Potter*, *McIlhenny v. Broussard*, and *National Audubon Society v. White* cases in recognizing rights of private citizens to construct navigable canals on their private property, and control the use thereof.

RESPECTFULLY SUBMITTED,

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER

BY: /s/ John E. Ortego
JOHN E. ORTEGO

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading on all counsel of record herein by mailing a copy to said counsel this day.

Abbeville, La., 9/12, 19 77.
/s/ John E. Ortego, Attorney
Cooper & Sonnier
121 East St. Victor
Abbeville, La. 70510

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NOS. 6258, 6259, 6260

VERMILION CORPORATION

PLAINTIFF-APPELLEE

VERSUS

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD

DEFENDANTS-APPELLANTS

APPEAL FROM THE 15th JUDICIAL DISTRICT COURT, VERMILION PARISH, LOUISIANA, HONORABLE ALLEN M. BABINEAUX, PRESIDING JUDGE.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS, NORMAN VAUGHN, LARRY J. AND FREDDIE BROUSSARD

MOUTON, ROY, CARMOUCHE, BIVINS & HILL

BY: /s/ John Hill
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COUNSEL FOR DEFENDANTS-APPELLANTS

[1] MAY IT PLEASE THE COURT:

Judge Domengeaux during oral argument discussed briefly *United States v. Kaiser-Aetna*, 408 F.Supp. 42, D.Hawaii, 1976.

Although a review of the subsequent jurisprudence reveals that *United States v. Kaiser Aetna* has not been cited, approvingly or otherwise, in federal cases, and also reveals no appellate action with regard thereto, the case is nevertheless interesting and instructive.

In *Kaiser Aetna*, the United States asked for a declaratory judgment and injunction to have Kuapa Pond [The Hawaii Kai Marina] declared "navigable waters of the United States" and to have a "navigation servitude" imposed thereon.

The Pond and Marina are situated wholly on property privately owned by the Bishop Estate, and leased to Kaiser Aetna.

The government contended that:

(a) The Pond was navigable in its natural state; or

(b) Was made so by subsequent development.

KUAPA VS. PECAN ISLAND - THE NATURAL STATE

The Pond in its natural state was navigable only by shallow draft canoes. It was adjacent to the Pacific Ocean, but separated therefrom by a barrier beach. Some of the Pond's water was from the sea, and the remainder from mountain run-off. It was affected by tidal action in its natural state.

However, in its natural state boat travel from the Pond to the ocean was not possible, even in shallow draft canoes, due to the existence of the barrier beach and stone wall reinforcements.

The Pond in its natural state was always considered private by the people and government of Hawaii. Prior to Hawaiian statehood and, indeed, prior to Hawaii becoming a territory of the United States, the various fish ponds adjacent to, but apparently separated from, the surrounding oceans were a part of the Hawaiian feudal system, totally controlled by a tribal chief who allowed sub-chiefs or subjects to fish or not to fish at his will.

[2] In 1848, the Hawaiian King gave the Pond property and fast land surrounding same to the Bishop Estate's ancestors in title.

Until 1961, the Kuapa area had been used solely and only as a fish pond, governed by the foregoing custom and practices.

Another stark factual-legal difference between the Kuapa Pond matter and the instant one is revealed by the Court's discussion at Page 51 of the opinion. The fish pond customs of old Hawaii were peculiarly local in history and culture. They were "unique" and were even specifically exempted from public access to their waters via Hawaiian legislation:

> "The Organic Act of 1900, following annexation, repealed all prior laws conferring private rights in *seawater* fisheries (subject to vested rights) but specifically exempted fishponds from its scope. A similar provision appears in the Hawaii Constitution, article X, §3. Opinions since annexation and statehood confirm the private nature of fishponds in Hawaii." (Emphasis theirs)

Therefore, it is readily apparent that there were significant factual, legal and customary differences between the Kuapa Pond area in its natural state, and the Fresh Water-Rollover Bayou areas South of Pecan Island in their natural state:

[2] [3]

(A) Kuapa Pond was in its natural state essentially separated from the ocean, certainly in the sense that boat traffic could not navigate from the Pond to the ocean. It was not open to the sea.

In the instant case, the facts which are readily apparent from a simple study of the official Louisiana map, from the matters on which the parties are in agreement in this case, and also from that which the appellants hope to prove should Your Honors reverse the trial court's decision, are that the area South of Pecan Island from Fresh Water Bayou to Rollover Bayou was, via at least those waterways, and perhaps others, in its natural state, open to the Gulf. Indeed, Fresh Water Bayou, as is evident from official Louisiana maps, but, more important, as appellants shall seek to prove at trial, was one of the principal highways of commerce of [3] the denizens of Pecan Island for many years. Fresh Water Bayou coursed from the Gulf to Pecan Island and beyond, and appellants believe they will be able to prove that same was used by the residents of Pecan Island to transport cattle, mail, groceries and people to and from the Island. Thus, in their natural states, the Hawaiian pond was hermetic and not open to the sea. The area and waterways South of Pecan Island in their natural state were open to the sea and were highways of commerce.

(B) Unlike Kuapa Pond, there is no evidence that the waterways, particularly Fresh Water Bayou and perhaps others, in the Pecan Island area were ever considered private in their natural state either by the people who lived there, or by the government and laws of the State of Louisiana. The Hawaiian Court went to prominent length to show that Kuapa Pond was considered quite private by both people and government. Indeed, Hawaii's history and culture, in which the customs of usage of the Pond developed, were feudal, and thus had virtually nothing in common with the Louisiana experience, at least post-1803.

[3] [4]

(C) Finally, there to the writer's knowledge are simply no counterparts in Louisiana legal history to the specific constitutional and statutory provisions in Hawaii, dating back to at least 1900, to the effect that the Hawaiian fish ponds were to be considered private property. This is truly a great difference between the area involved in the *Kaiser Aetna* case and the area involved in this case, when both are considered in their natural states.

HAWAII KAI VS. PECAN ISLAND – AS IMPROVED

The Hawaiian Court then discussed the facts of the development of the Kuapa Pond into Hawaii Kai Marina post-1961: In 1961, the Kaiser Aetna interests leased from the Bishop Estate the Pond, and applied to the Corps of Engineers for permits to dredge and channelize. The Corps at that time advised Kaiser Aetna that no permits were needed.

Kaiser Aetna thereafter dredged, and after development of the area and opening same via channel to the ocean, allowed [4] owners of subdivision lots in the area an easement to operate their boats on the Pond, and in the channel to the sea. A 25-passenger sightseeing boat was operated by Kaiser Aetna in the area, presumably as an enticement to potential subdivision lot buyers. This passenger boat was then taken over by the merchants' association of the subdivision area, but apparently at all times operated only in the Pond waters, and not in the open sea.

These facts of the subsequent development are substantially different from those of the development in the Pecan Island area by the Vermilion Corporation's ancestors in title:

There is no apparent history of the Corps of Engineers' having gone on record at any time indicating that permits were not needed in the Pecan Island area prior to the development of

canals. Furthermore, after the development of the Humble Canals, which are generally speaking 60 feet in width by 8 feet in depth, commercial and navigational use has not been limited to sightseeing by land owners in the area. In the Pecan Island area, barges, dredges, shrimp boats and various other kinds of fishing boats, not only owned or working in the interest of the Vermilion Corporation, but others, have regularly used these canals.

THE LAW

The Hawaii Court's discussion of the law is instructive.

First, at Page 48 of the opinion, one sees that the concept of "navigable waters" grew out of the "common right of piscary [fishing]" of the English common law. This was the right simply to travel on common waters, and to fish them.

Also on Page 48, one should note the Court's brief discussion of the Commerce Clause – Article 1, Section 8, Clause 2. Jurisdiction of the surface of navigable waters of the United States passed to the government of the United States upon ratification of the Constitution.

A crucial legal difference between the instant matter and *United States v. Kaiser Aetna* is evident from the following quote from the Hawaiian case:

> [5] "Jurisdiction over the surface of navigable waters lying wholly within a single state, and not connecting with other waters to form a navigable highway of interstate commerce, remained with the situs state."

In the instant case, the "navigable waters" in question in the Pecan island area, in both their natural state – prior to the

"Humble Canal" development – and in their artificially developed state thereafter - unquestionably connected "with other waters to form a navigable highway of interstate commerce."

Accordingly, and as appellants have urged all along, this matter is not to be decided by state law, but by federal law, as this is a matter of federal jurisdiction, and not of jurisdiction of waters which do not connect with "navigable highways of interstate commerce."

And what is the federal law, if the waters in the Pecan Island area were navigable *prior* to the Humble Canal development? Note Page 49 of the Hawaiian opinion:

> "If Kuapa Pond was navigable water of the United States prior to its development by defendants, such development would not have destroyed that status, absent a specific Congressional abandonment of the waters, and the marina would, unquestionably be subject to the public's right of access. See *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124, 41 S.Ct. 409, 65 L.Ed. 847 (1921)."

In the instant case, Vaughn, Broussard and Broussard sought to prove in the Trial Court that the waterways in the Pecan Island area, particularly Fresh Water Bayou, were "navigable waters" prior to their development and augmentation artificially by the Humble-Vermilion Corporation interests. If that can be proved, it is clear from the above quotation that that development and augmentation artificially of the waterways in the areas could in no way deny or remove their already existing status as "navigable waters of the United States.

Certainly one knows that Humble developed channels which physically were not exactly present in the area theretofore.

[5] [6]

But, in so developing and changing, if same was done at the expense of a natural navigable system, how can Humble's predecessors *deny* to the public that which Humble took *from* the public?

[6] The affidavit of appellants in the Trial Court, and a simple view of the official maps of the State of Louisiana over the years, indicate that the old Fresh Water Bayou – in its state prior to the development by Humble of its canal system – flowed into the Gulf. Indeed, the entire area, from roughly Pecan Island on the North, to the Gulf on the South, to Roll-over Bayou on the West, and to Fresh Water and beyond on the East, is now and always has been tidal. All parties are in agreement as to the latter statement. The Court should consider these facts against the following quotation from the Hawaiian case:

> "As indicated above, unquestionably the Pacific tides ebbed and flowed over Kuapa Pond in its pre-marina state. Maps and surveys, as well as the bases of fishpond aquaculture, establish that there would have been at least a minimum basis for federal jurisdiction if the ebb and flow test could be applied, because some of Kuapa Pond was *always* inundated. Therefore, *if it were not for the unique legal status of Hawaiian private property, free and clear of any claim by the Crown either to the beds thereof or the waters thereon under Hawaiian law prior to annexation, and their protection then and thereafter as such by statute and Constitution, application of the ebb and flow test would have established a public right of access to Kuapa Pond.*" (emphasis ours).

Thus, there is yet another crucial difference between the Hawaiian case and the instant matter. Surely no one can or does claim that the natural navigable water system that existed

[6] [7]

in the Pecan Island area prior to the development by Humble, et al of the artificial canal system fell within the "unique legal status . . . as strictly private property." Indeed, the facts which either are not disputed, or if pro forma disputed, which can easily be proved at trial by appellants, are that just the opposite was true prior to the development by Humble, of the artificial canal system.

Accordingly, if one assumes that the Hawaiian case accurately states the law which bears upon the instant case in all respects, appellants feel that the Court's conclusion in this case must be, at the very least, that the Motion for Summary Judgment was improperly granted by Judge Babineaux, as, if plaintiff's version of the facts is true, the natural navigable waterway system on and South of Pecan Island prior to the [7] development by Humble of its artificial canal system was (1) navigable, (2) "navigable water of the United States," and, (3) there was thus, prior to the development of the artificial canal system, a "public right of access" in and to these waters.

The Hawaiian Court concluded that Kuapa Pond in its natural state was never subject to public use. Since appellants seek to prove, and should have been given the opportunity to prove, that the pre-existing navigable waterway system in the Pecan Island area was always subject to public use prior to the development of the Humble canal system, the Hawaiian case not only fails to support the Vermilion Corporation's position, but indeed supports just the opposite conclusion.

It is clear from a reading of the Hawaiian opinion that had Kuapa Pond been found to have been a waterway which in its natural state was open to public use, no change or alteration thereof, and no building of a private waterway system at the expense of that natural navigable waterway system would have been permitted.

[7] [8]

In other words, a private developer cannot take from the public what the public already has, and then demand compensation for it as a defense to the public's claiming its right of use.

Finally, it is clear that the Kaiser Aetna case shows that, even if an area like Kuapa Pond be "private", if that area, through subsequent private development, be made in fact to support commerce, the navigation servitude may arise. Indeed, the Hawaiian Court held specifically that Kuapa Pond, although private in its natural state, by virtue of the improvements thereon done by a private developer and by virtue of the uses to which the subsequent improved areas was put, had become "navigable waters of the United States." This holding directly supports another of appellants' contentions in this matter.

However, since in the instant case, it is either already an acknowledged fact between the parties that there was a pre-existing natural navigable waterway system, open to public use, in the Pecan Island area, or, at the very least, since that fact is in dispute between the parties and may very well be proved by appellants if [8] given a chance at trial, and since the Humble interests merely developed, at the expense of that natural navigable waterway system, an artificial waterway system in its place, and thus simply *substituted* a pre-existing natural navigable waterway system with an artificial one, the Hawaiian case can only stand for the proposition that the subsequent waterway system is no less burdened with the "navigation servitude" than was the former one, and it can hardly be said that the developer of the artificial canal system is entitled to compensation for giving to the public in another form that which the public already had by virtue of its rights under the Constitution of the United States.

Finally, the Hawaiian case should be read in light of the state and Fifth Circuit area cases which have been cited to Your Honors by appellants:

[8] [9]

In *Dalbora v. Garcia*, and *Discon v. Saray*, when a private developer created a navigable waterway system, even though one had not existed theretofore, our state court system imposed a "navigation servitude" on those waters. Although *Dalbora* and *Discon* discuss numerous reasons for the granting of relief, appellants believe it is artificial, inaccurate, and unrealistic to believe that those cases in their totality stand for any proposition other than that advocated by appellants in this matter.

The Florida Federal Court case, *United States v. Sexton Cove Estates*, supports the same proposition, and cites a Fifth Circuit case, *Tatum v. Blackstock*, as support for its holding.

The "navigation servitude" has been with us since the ratification of the United States Constitution. Before that it was a creature of the English law. Appellants thus do not come to this Court seeking the establishment of some new and revolutionary principle which does violence to the institution of private property. Appellants do not seek to deprive anyone of any property, let alone without compensation.

[9] Appellants merely seek from this Court, via reversal of Judge Babineaux' granting of the Vermilion Corporation's Motion for Summary Judgment, recognition of the following:

(a) That there are substantial matters of fact which bear heavily upon a proper disposition of this case, which are either disputed between the parties, and/or had not as yet been fully developed by either party;

(b) That, if a private developer develops a waterway system which becomes "navigable water of the United States," and develops it in and virtually *over* a pre-existing natural navigable waterway system, the public has a "navigation servitude" on the newly developed waterway system, and owes the private developer nothing simply for that developer's changing the form of that which the public already had.

[9]

Respectfully submitted,

MOUTON, ROY, CARMOUCHE, BIVINS & HILL

BY: /s/ John Hill
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502
ATTORNEYS FOR APPELLANTS

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Supplemental Brief on behalf of Appellants has been mailed to Mr. Charles Sonnier, counsel for Appellee herein.

Lafayette, Louisiana, January 13, 1978.

/s/ John Hill
JOHN K. HILL, JR.

EXHIBIT E

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, Notary Public in and for the aforesaid Parish and State, this 23 day of May, 1977, personally came and appeared:

NORMAN VAUGHN, FREDDIE BROUSSARD and LARRY J. BROUSSARD, all of the full age of majority and residents of the Parish of Vermilion, Louisiana.

who, on their oaths, declared:

As long as deponents can remember, the Humble Canal System has been used by fishermen, hunters, trappers, sportsmen, and generally anyone who wanted to use same. Broussard's and Hazel's Landings have been public landings and launch ramps on the Humble Canal System for years.

Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system in the area of Pecan Island, for example, Little Rollover Bayou and Freshwater Bayou, were actually used for purposes of transporting mail, transporting cattle, and transporting people, to and from Pecan Island on various kinds of small vessels. These natural waterways only ceased to be useable for these purposes after Humble developed its artificial waterway system.

AND FURTHER DEPONENTS SAITH NAUGHT.

/s/ Norman Vaughn
NORMAN VAUGHN

/s/ Freddie Broussard
FREDDIE BROUSSARD

/s/ Larry J. Broussard
LARRY J. BROUSSARD

SWORN TO AND SUBSCRIBED before me this 23 day of May, 1977, at Lafayette, Louisiana.

/s/ illegible
NOTARY PUBLIC

EXHIBIT F

SUPREME COURT OF LOUISIANA

NO. _____

VERMILION CORPORATION,

Plaintiff-Appellee

VERSUS

NORMAN VAUGHN, ET AL

Defendants-Appellants

* * * * * * * * * * * * * * * * *

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW

* * * * * * * * * * * * * * * * *

From the Court of Appeal
Third Circuit
Docket Nos. 6258, 6259, 6260

* * * * * * * * * * * * * * * * *

Application by Norman Vaughn,
Freddie Broussard and Larry J. Broussard

MOUTON, ROY, CARMOUCHE, BIVINS
& HILL

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
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[1] STATEMENT OF THE CASE

Vermilion Corporation, Lessee from Exxon Corporation of a large portion of the Louisiana Wetlands in Vermilion Parish South of Pecan Island (including lands from the Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre on the East to Rollover Bayou on the West) brought suit in Vermilion Parish against Relators Vaughn, Broussard and Broussard, alleging that Relators had "trespassed" on the plaintiff's leasehold via using Vermilion Corporation's canal system developed by plaintiff and its predecessors in title on the leasehold, and by fishing and shrimping therein, all without permission of the Vermilion Corporation.

Relators answered, pleading in the main that these canals are "navigable waters of the United States" and that, under both federal and state law, the public has a paramount easement of use thereof, and that the canals are thus not subject to private dominion, ownership or control. The cases, being virtually identical, were consolidated.

Vermilion Corporation filed a Motion for Summary Judgment in the Trial Court, and, in reasons filed on June 7, 1977, the Honorable Judge Babineaux granted the summary judgment, holding, in effect, that the canals on the leasehold are private, privately owned, and subject to private control. Judgment pursuant thereto was signed on 22 June 1977. Motion and Order for Appeal was signed on the same date, and the appeal was timely perfected.

The matter was briefed and argued in the Court of Appeal and on February 6, 1978, by Judge Domengeaux, the Court of Appeal rendered its decision which affirmed Judge Babineaux' granting of the Vermilion Corporation's Motion for Summary Judgment in all three cases. Relators made no application for

rehearing, but have applied directly to this Court for the issuance of a Writ of Certiorari or Review, seeking reversal of the Judgments of the Trial Court and of the Court of Appeal, Third Circuit.

[2] STATEMENT OF FACTS

The ancestors in title of the Vermilion Corporation at various times since roughly 1940 built with private funds on their privately owned lands canals which generally speaking are 60 feet in width by eight feet in depth. The canal system thereby developed is entirely unitary in that no part thereof is sealed or separate from any other part. Furthermore, the canals, from their several beginnings on or near the South side of Pecan Island, Louisiana, flow southerly a few miles into the Gulf of Mexico, and the canal system otherwise connects with Fresh Water Bayou Canal and the Intracoastal Waterway.

The entire canal system is clearly subject to tidal fluctuation, and is unquestionably and undisputedly navigable in fact.

In the Trial Court, the Vermilion Corporation, in its Motion for Summary Judgment, in effect admitted the truth of the majority of the Relators' factual allegations, which Relators believe supported their claim that the canal system is navigable in fact, navigable in law, and thus is navigable water of the United States, not subject to private dominion and control, but burdened with a navigation servitude in favor of the public.

The only significant factual allegation made by Relators which the Vermilion Corporation disputed in the Trial Court and in the Court of Appeal was that, in building this artificial canal system, the Vermilion Corporation's ancestors in title had used, impaired, and finally destroyed the *factual* navigability of certain *natural* navigable waterways which formerly existed in this area. Specifically, at all times in this litigation Vaughn,

Broussard and Broussard have alleged that Fresh Water Bayou, on and prior to the time of development of the artificial canal system, existed in a natural state, flowed from a point North of Pecan Island, southerly to the East of Pecan Island, and thence Southerly to the Gulf, and that this natural navigable waterway was an actual highway of commerce for the [3] citizens of Pecan Island and landowners in the area. Indeed, it was the contention of Relators in the courts below that Fresh Water Bayou had been used prior to the development of the artificial canal system in the area to transport cattle, groceries, human beings and the United States Mail to and from Pecan Island.

Furthermore, and most important, Relators alleged in the Trial Court, and swore to in affidavits, that those natural navigable waterways [particularly Fresh Water Bayou] became unuseable as such only when the Vermilion Corporation's ancestors in title built their artificial navigable waterways in the area, and as a direct result thereof. It is this exact point which is in vehement dispute between the parties, as, although the Vermilion Corporation does not to Relators' knowledge dispute that Fresh Water Bayou was once used as a navigable waterway, respondent does dispute heartily that its destruction was due to the actions of Humble Oil Company, et al, in building an artificial canal system essentially on top of the old Fresh Water Bayou and its allied waterways.

[4] **ASSIGNMENT OF ERROR NO. 1**

THERE WAS GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER OR NOT THE ANCESTORS OF THE VERMILION CORPORATION USED, DIVERTED AND DESTROYED PRE-EXISTING NATURAL NAVIGABLE WATERWAYS IN ORDER TO BUILD THEIR ARTIFICIAL WATERWAY SYSTEM, AND THUS ON THAT ACCOUNT ALONE SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BY THE TRIAL COURT, AND ITS GRANTING SHOULD HAVE BEEN REVERSED BY THE COURT OF APPEAL.

A simple reading of the affidavit submitted by Relators in opposition to the Motion for Summary Judgment in the Trial Court, as against the deposition of the respondent's Chief Executive Officer, Mr. John Donohue, shows that on this one crucial factual point the parties are in stark disagreement.

Presumably, the Vermilion Corporation does not deny that, prior to the development of the artificial canal system in the Pecan Island area, there was a natural navigable waterway system – primarily Fresh Water Bayou – which was used by the residents of Pecan Island to transport their cattle, their mail, their groceries and themselves to and from their homes. The Fresh Water Bayou in its former natural state allowed one, for example, to navigate in shallow draft vessels from Pecan Island south, thence to debouch into the Gulf of Mexico.

What is in dispute between the parties is whether or not the Vermilion Corporation's ancestors in title, in digging their artificial canals, and in tying those canals to other unquestionably navigable waterways, thereby destroyed the navigability of the pre-existing natural navigable waterway system.

[4] [5]

Admittedly, there was very little otherwise which was or is in dispute between the parties.

However, if the resolution of this one factual dispute would have any effect on the ultimate disposition of this inquiry then the clear statutory and jurisprudential law dictated that summary judgment should have been denied. LSA - C.C.P. Articles 966 through 969, and, for example, *Laufer v. Touro*, 334 So.2d 541, [5] *Savoy v. Action Products Company*, 324 So.2d 921, and *Rosen v. Capital City Press*, 314 So.2d 511, dictate that the remedy of summary judgment must be used cautiously, is no substitute for trial, requires the resolution of all doubt concerning dispute as to issue of fact concerning trial on the merits, and can be granted only when the mover is clearly entitled thereto. Even should a Court feel that the party against whom Summary Judgment is sought has little chance to prevail at trial, the Motion for Summary Judgment nevertheless must be denied if there is "genuine issue of material fact" present in the lawsuit.

For reasons which shall be discussed *infra*, the resolution of this one factual dispute in itself could dictate which party would prevail as a matter of law. If that is the case, for this simple procedural reason a writ should issue and the Judgment of the Court of Appeal and Trial Court granting summary judgment in favor of the Vermilion Corporation should be reversed, and the matter remanded for trial on the merits.

[6] [6]

[6] ASSIGNMENT OF ERROR NO. 2

IT WAS ERROR FOR THE TRIAL COURT AND THE COURT OF APPEAL TO FAIL TO RECOGNIZE AND APPLY THE LEGAL PRINCIPLE THAT, SHOULD A PRIVATE PARTY DEVELOP AN ARTIFICIAL NAVIGABLE WATERWAY SYSTEM ON ITS OWN PROPERTY VIA DIVERSION, USE AND DESTRUCTION OF A PRE-EXISTING NATURAL NAVIGABLE WATERWAY SYSTEM IN THE SAME AREA, THE SUBSEQUENT DEVELOPMENT WOULD NOT DESTROY THE STATUS OF THE WATERWAYS AS NAVIGABLE WATER OF THE UNITED STATES, BUT WOULD IMPOSE UPON THE SUBSEQUENT DEVELOPMENT A PUBLIC RIGHT OF ACCESS AND NAVIGATION.

Article 1, Section 8, Clause 3 of the Constitution of the United States gives to the United States jurisdiction of the surface of "navigable waters of the United States." *Martin v. Waddell's Lessee*, 41 U. S. 367, 10 L.Ed. 997 [1842].

"Navigable waters of the United States" are not subject to private dominion or control, and the public has a servitude of navigation thereon:

> "The concept of 'navigable waters' grew out of the 'public common of piscary,' i.e., the right of the common people of England to travel upon the waters and to fish them.
>
> * * *
>
> "The term 'navigability' has many legally distinct applications. [1] It may determine title to river and lake beds. [2] It has been the touchstone of congressional jurisdiction over waters via the Commerce Clause. [3] It embodies the navigation servitude, a

[6] [7]

modern declaration of the common law right of access of waters. In addition [4] Admiralty jurisdiction in federal courts flows from the general concept of navigability."

> *United States v. Kaiser-Aetna*, 408 F.Supp. 42, 48-49, D.C., Hawaii 1976. See also *United States v. Appalachian Elec. Power Co.*, 61 S.Ct. 291, 307-308 (1940); *United States v. Willow River Power Co.*, 65 S.Ct. 761, 766-767 (1945); *United States v. Twin City Power Co.*, 76 S.Ct. 259, 261-262 (1956); *United States v. 421.715 Acres etc.*, 53 F.Supp. 143, 148 N.D. Cal. (1943).

If Vaughn, Broussard and Broussard had been allowed in the Trial Court to proceed on the merits, they would have defended the Vermilion Corporation's action for trespass via, inter alia, [7] attempting to prove as a fact the "navigability" of Fresh Water Bayou and other natural waterways in the Pecan Island area prior to the development of the Humble Canal System.

In so proving, Relators ipso facto would have shown that prior to the development of the artificial canal system, there was a system of natural "navigable waters of the United States" in the area, subject to a "navigation servitude," in favor of the public, as they would have shown that there existed bodies of water suitable for use for transportation and commerce, which could have been made even more suitable therefor by reasonable improvements, which was actually used for both private and commercial navigable purposes, which was subject to tidal fluctuation, and which open to and provided access to the open sea. See the various criteria for determination of status as "navigable waters of the United States" in *United States v.*

[7] [8]

Cannon, 363 F.Supp. 1045, District Court, Delaware, 1973; *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, D.C. Delaare, 1973; *United States v. Underwood*, 344 F.Supp. 486, Florida, 1972; *United States v. Stoeco Homes*, 498 F.2d 610; *United States v. Moretti*, 478 F.2d 428; and *United States v. Lewis*, 355 F.Supp. 1132.

In the above cited *United States v. Kaiser-Aetna*, it was claimed that Kuapa Pond, prior to artificial development which enhanced and enlarged it, and which opened it to the ocean, was "navigable water of the United States" burdened with a "navigation servitude." Although the particular factual and legal background of Hawaiian tidal ponds dictated a different result, a particular portion of the opinion of the Court in that case shows exactly why proof in the instant matter of pre-existing navigable status of Fresh Water Bayou, et al, would have dictated ultimately a ruling against the Vermilion Corporation and in favor of Relators on the core questions of the lawsuit:

> "If Kuapa Pond was navigable water of the United States prior to its development by defendants, *such development would not have destroyed that status*, absent a specific congressional abandonment of the waters, and the marina would unquestionably be subject to the public's right of access. [8] See *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124, 41 S.Ct. 409, 65 L.Ed. 847 [1921]." *Supra*, Page 49.

Furthermore, if via building of an artificial navigable waterway system in the Pecan Island area the Vermilion Corporation's ancestors obstructed or destroyed the "navigable capacity" of a "highway of commerce," these oil companies would have ipso facto violated 33 U.S.C. 403 and L.S.A.-R.S. 14:97. 33 U.S.C. 403 states that no person may pose any "obstruction"

to the "navigable capacity" of "navigable waters of the United States" and *United States v. Republic Steel,* 80 S.Ct. 884, says that "obstruction" means any kind of "obstruction" and not simply that delineated specifically in 33 U.S.C. 403.

R.S. 14:97 says that no one may obstruct a "highway of commerce" including a "navigable waterway." May the law countenance the development of a privately controlled waterway system via the use and destruction of a public waterway system? Of course not, and 33 U.S.C. 403, as well as R.S. 14:97, are merely statutory reflections of the existence of a "navigation servitude" which was born in the common law, and preserved in the United States Constitution. The remedy, as *United States v. Kaiser-Aetna* shows, for the violation of this constitutional principle, and for the specific violation of 33 U.S.C. 403 and R.S. 14:97, is to say that the navigation servitude which existed on natural navigable waterways prior to the development of an artificial waterway system, but which was destroyed in fact via that development, is simply transposed in law to and upon the new artificial canal system.

Judge Babineaux thought it made no difference whether or not there was in the Pecan Island area prior to 1940 a natural navigable waterway system, which was impaired or destroyed via the subsequent development of a "private" waterway system. The Court of Appeal, Third Circuit, agreed. Accordingly, since the resolution of the factual dispute of the parties on this point was erroneously held by the Courts below to have made no difference, a Motion for Summary Judgment was wrongly granted, and its granting was erroneously affirmed.

[9] **ASSIGNMENT OF ERROR NO. 3**

MANMADE CHANNELS WHICH ARE NAVIGABLE AND WHICH CONNECT WITH OTHER NAVIGABLE WATERS BECOME "NAVIGABLE WATERS OF THE UNITED STATES" NOTWITHSTANDING THAT THEY ARE ON PRIVATE PROPERTY AND ARE DEVELOPED WITH PRIVATE FUNDS, AND, AS THE UNDISPUTED FACTS SHOWED THAT THE CANALS DEVELOPED BY RESPONDENT'S ANCESTORS IN TITLE ARE NAVIGABLE IN FACT, AND ARE CONNECTED TO TIDAL AND OTHER NAVIGABLE WATERS, IT WAS ERROR FOR THE COURTS BELOW TO FAIL TO HOLD THAT A NAVIGATION SERVITUDE AROSE IN FAVOR OF THE PUBLIC ON THE HUMBLE CANAL SYSTEM, WHICH PREVENTS PRIVATE DOMINION AND CONTROL.

As is evident from a review of the record, the parties agree that the sixty foot wide by eight foot deep artificial canal system developed by Vermilion Corporation's ancestors in title is navigable in fact: Crew boats, cargo boats, fishing boats, drilling barges, and similar vessels have regularly used these canals since their creation.

Furthermore, one can launch a boat at one of the headwaters of this canal system on the South side of Pecan Island, and from there navigate South into the Gulf of Mexico, or East into West Chenier Au Tigre Canal or Fresh Water Bayou Canal, or North to Schooner Bayou and Intracoastal Waterway. In other words, this unitary canal system would allow one to leave Pecan Island in a boat and sail unimpeded to Jacksonville, Florida, via the Intracoastal Waterway, or to Buenos Aires by the open ocean.

It is also undisputed that the waters of this canal system are brackish; many of the fish species therein are of salt water

origin. Daily these canals rise and fall perceptibly with the tides.

In *United States v. Sexton Cove Estates*, 389 F.Supp. 602, and in *United States v. Kaiser-Aetna, supra*, Page 53, one sees unquestioned recognition of the proposition that, although a canal system be developed with private funds on private property, if the canals created thereby are navigable in fact and are subject to tidal fluctuation and otherwise connect with other "navigable waters of the United States," the canals so created themselves become "navigable waters of the United States," subject to the "navigation servitude."

[10] In other words, the concept of private dominion from the sky to the center of the earth for him who owns the land ceases now, as it always has, when that private developer, on his private property, digs enough of a ditch, and connects it with other navigable waterways to such an extent, that enough water flows through the ditch to support commerce. The private owner's property is not thereby expropriated. Nothing is taken away from him. There simply arises, for purposes of surface use of the waterways, a servitude in favor of the citizens of the United States generally to navigate over and fish upon those waters, and to that limited extent, the private owner who built the canals cannot control their use.

There is nothing new about this principle in the law of Louisiana. Despite numerous attempts by the Court of Appeal, Third Circuit, in *National Audubon Society v. White*, 302 So.2d 660, writ denied 305 So.2d 542, to distinguish *Discon v. Saray, Inc.*, 262 La. 997, 265 So.2d 465 [1972], and *D'Albora v. Garcia*, 144 So.2d 911, La. App. 4th Cir., 1962, the fact is that a fair reading of these cases indicates that they recognize the principle set forth in *Sexton Cove Estates* and *Kaiser-Aetna* to the effect that privately developed canals, if they are navigable, and if they are connected with other navigable waterways, themselves become subject to a "navigation servitude."

The Trial Court in following *National Audubon Society v. White*, and the Court of Appeal, Third Circuit, in originally rendering the opinion therein and in following it in this case, committed error, for, despite the fact that it is undisputed between the parties to this litigation that the Humble canal system is navigable in fact and navigable in law, and connected to other waterways also navigable in fact and navigable in law, both Courts held that as a matter of law it made no difference; that the canals were nevertheless private property, subject to private dominion and control.

[11] SUMMARY AND CONCLUSION

In this case, there appears to be a clash of competing interests. That clash is illusory, because such clash as there may have been between private property on the one hand, and the public right of navigation and navigable waters on the other was resolved hundreds of years ago in the English Common Law, thence in the United States Constitution, thence in the cases construing same, thence in the statutes of the United States and the State of Louisiana. On and over "navigable waters" the public is entitled to traverse without having to answer to private owners of the banks or the beds. That is the way it has always been, and that is the way it should be in this case, and in the future.

The Relators should have been allowed in the Trial Court the opportunity to prove at a trial on the merits that, before the Vermilion Corporation's ancestors ever dug the first big ditch in the area, there were natural canals and bayous which were navigable in fact, and thus navigable in law, thus subject to the navigation servitude.

Relators then should have been allowed the opportunity to prove that those natural navigable waterways were impaired and destroyed in their navigable capacity only when the oil

industry built artificial canals on, over and through the natural waterways, thus starving and killing them.

Had Summary Judgment not been granted, and had Relators proved these factual contentions at trial, then the Trial Court would have been compelled to decide that the "navigation servitude" which existed on the natural waterways prior to the development of the Humble canal system did not die, but devolved upon the artificial system which was built in place of the natural.

Finally, and in any event, the Courts below should have recognized that the law of this state and of the United States is that "navigable waters of the United States" acquire their status not only via natural development, but via artificial, manmade, privately funded construction which creates canals [12] navigable in themselves, subject to the ebb and flow of the tides, and connected to other pre-existing navigable waterways.

It is time, Relators submit, for the highest Court of this State to speak definitely on this subject, which is so important in a State blessed with wetlands, a coastline, and a maze of waterways of natural and artificial origin which are wed to each other and flow together.

Respectfully submitted,

MOUTON, ROY, CARMOUCHE, BIVINS & HILL

BY: /s/ John Hill
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COUNSEL FOR RELATORS

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, Notary Public in and for the aforesaid Parish and State, this 6 day of March, 1978, personally came and appeared:

JOHN K. HILL, JR., to me personally known, who on his oath did depose and say:

That he is the attorney of record for Relators in the foregoing matter; that he has prepared the foregoing Application for Writ of Certiorari or Review; that the allegations of fact contained therein are true and correct to the best of his knowledge, information and belief.

Appearer further declares that a copy of the above and foregoing Application for Writ of Certiorari or Review has been duly mailed to counsel for respondents, Mr. Charles Sonnier, by depositing a copy thereof in the United States Mail, properly addressed and postage prepaid on the 6 day of March, 1978.

/s/ John K. Hill, Jr.
JOHN K. HILL, JR.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 6th DAY OF MARCH, 1978, AT LAFAYETTE, LOUISIANA.

/s/ illegible
NOTARY PUBLIC

Supreme Court, U. S.
FILED
MAY 14 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, LARRY J. BROUSSARD AND FREDDIE BROUSSARD, *Petitioners*,

v.

VERMILION CORPORATION, *Respondent*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI FILED JUNE 23, 1978
CERTIORARI GRANTED FEBRUARY 21, 1979

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DOCKET ENTRIES

1. Vermilion Corporation v. Norman Vaughn, Docket 35948, 15th Judicial District Court, Vermilion Parish, Louisiana, was filed on October 12, 1976

2. Vermilion Corporation v. Larry Broussard, Docket 36983, 15th Judicial District Court, Vermilion Parish, Louisiana, was filed on October 12, 1976

3. Vermilion Corporation v. Freddie Broussard, Docket 35982, 15th Judicial District Court, Vermilion Parish, Louisiana, was filed on October 12, 1976

4. Answers of Vaughn, Broussard and Broussard in all three cases were filed on March 21, 1977

5. Motion for Summary Judgment of the Vermilion Corporation in all three cases was filed in the State Trial Court on May 16, 1977

6. Motion for Summary Judgment on all three cases was decided via "Minute Entry" of June 7, 1977. That Minute Entry, which constitutes the finding and opinion of the Trial Court in all three cases, appears at Page A-1 of the "Petition for Certiorari" filed by Relators in this matter.

7. Motion to Consolidate and Order granting same was executed and filed in all three cases on June 22, 1977

8. The formal Judgment of the 15th Judicial District Court, Parish of Vermilion, Louisiana, in all three cases was signed and filed on June 27, 1977, and appears at Page A-5 of the "Petition for Certiorari" filed by Relators in this matter.

9. Motion and Order for Appeal in all three cases to the Court of Appeal, Third Circuit, State of Louisiana, was executed and filed on June 27, 1977

10. The Opinion of the Court of Appeal, Third Circuit, State of Louisiana, in all three cases was filed on February 6, 1978

11. The Opinion of the Court of Appeal is reported at 356 So.2d 551, La. App. 3rd Cir., 1978

12. Timely Application to the Supreme Court of Louisiana for the issuance of a Writ of Certiorari or Review was denied by that Court on March 27, 1978, and the Docket Entry evidencing that denial is set forth at Page A-18 of the Petition for Certiorari filed by Relators previously in this matter.

13. Petition for Certiorari to this Court in Docket No. 77-1819 was filed on June 23, 1978

14. Writ of Certiorari was granted by this Court on February 21, 1979

EXPLANATORY NOTE

The petitions of Vermilion Corporation in its virtually identical suits against all three Relators in the State Trial Court [Docket Nos. 35948, 36982 and 36983, 15th Judicial District Court, Parish of Vermilion, Louisiana], the answers of all three Relators therein, the Motions for Summary Judgment filed by Vermilion Corporation in all three cases, the Affidavits of Murphy Sellers and John Donohue in support of those Motions for Summary Judgment in all three cases, the Affidavits of Relators filed in opposition to those Motions for Summary Judgment, and, generally, the Opinion and Judgment of the State Trial Court, the Opinions of the Court of Appeal, Third Circuit, State of Louisiana, in all three cases [Docket Nos. 6258 through 6260], and the Docket Entry in all three cases in the Supreme Court of Louisiana are either completely identical or so nearly identical as to be without probative difference.

Accordingly, in this Appendix, Petitions, Answers, Motions, Affidavits, Minute Entries, Judgments, and the Opinions of the Court of Appeal, Third Circuit and Docket Entries of the Supreme Court of Louisiana are reproduced only with regard to *Vermilion Corporation v. Vaughn.* The records of all three consolidated cases are before the Court, but reference to this Appendix and to the record of the Vaughn case would in all inquiries reveal the entire contents of all matters relevant to the consideration by this Court on the merits.

15TH JUDICIAL DISTRICT COURT

NUMBER: 35948

VERMILION PARISH, LOUISIANA

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

PETITION FOR PERMANENT INJUNCTION AND DAMAGES

The petition of VERMILION CORPORATION, a corporation organized under the laws of the State of Delaware and authorized to do business in the State of Louisiana, with respect, represents that:

1.

Petitioner is the Lessee of and is in possession of certain lands in Vermilion Parish, Louisiana, which lands are fully described in the copy of the lease and amendments attached hereto and marked Exhibits "A", "B", and "C".

2.

Petitioner, pursuant to the terms and provisions of said lease and amendment, and under the authority therein granted is entitled to bring this action in the place and stead of the Lessor named in said lease and amendment, its successors or assigns.

3.

Norman Vaughn, a resident of Vermilion Parish, Louisiana, has without permission of your petitioner, trespassed on the lands of petitioner and more particularly in the private canals located within said lands, despite the fact that said lands are properly posted with "No Trespassing, Vermilion Corporation" signs, showing the properties and canals to be subject to the exclusive possession of petitioner.

4.

All of the canals in question were built and have been maintained by either petitioner, its lessor, their predecessors, their agents, assigns or sublessees.

5.

Said trespass by defendant, Norman Vaughn, was willful and knowing on his part and occurred on several occasions and more particularly on or about June 26, 1975, in a canal at a point approximately one-fourth (¼) of a mile North of Exxon Company Well No. 21, located in Section 26, Township 16 South, Range 1 West.

6.

Again, on or about July 18, 1975, defendant, Norman Vaughn, trespassed at a point approximately one-eighth (⅛) of a mile East of Exxon Company Well No. 46, located in Section 29, Township 16 South, Range 1 East.

7.

Defendant again trespassed on or about September 14, 1975, at a point located between two bridges constructed across what is known as the Humble Canal, located in Section 31, Township 16 South, Range 2 East.

8.

Defendant again trespassed on or about September 24, 1975, at a point approximately one-half (½) miles East of a cattle crossing on the Humble Canal located in Section 26, Township 16 South, Range 1 East.

9.

On each of said occasions, defendant, Norman Vaughn, was issued a warning and notice by Murphy Sellers, the Field Superintendent and Warden of petitioner in the

presence of petitioner's employee, Earl Harden. Said Warning being given to defendant in the form of legal notices, copies of which are attached hereto and marked Exhibit "D", for identification.

10.

At the time of each trespass and at other times not herein specified, defendant has engaged in commercial fishing and/or shrimping in petitioner's canals resulting in the harvest of large catches of shrimp and fish of great value.

11.

Defendant's actions and defiance of ample warning has directly and indirectly encouraged others to trespass and engage in commercial fishing, all to plaintiff's detriment.

12.

Additionally, defendant has caused petitioner to suffer damages past, present and future, due to the illegal and unauthorized fishing in a sum exceeding $250,000.00, all of which will be more accurately determined on the trial hereof.

13.

Despite the warnings given to defendant by the Warden, Murphy Sellers, the said Norman Vaughn continues to trespass and fish on the several canals subject to the control and possession of petitioner causing the damages enumerated.

14.

The defendant thus violated the rights of petitioner by this act of trespassing and petitioner is entitled to an injunction enjoining and prohibiting the said Norman Vaughn from trespassing on the property and canals within the property in control and possession of petitioner, pursuant

to the above mentioned leases and for the damages in excess of $250,000.00, all of which is to be more fully shown at the trial hereof.

WHEREFORE, petitioner prays that the defendant be duly cited to appear and answer this petition and after due proceedings had, there be judgment herein in favor of petitioner Vermilion Corporation, and against the defendant, Norman Vaughn, decreeing the above acts of defendant to constitute a trespass of the rights of petitioner and enjoining, restraining and prohibiting Norman Vaughn from trespassing on any property and canals within the property of petitioner as described in the leases mentioned in paragraph 1 above, and further, that said defendant be assessed with all proven damages and costs of court.

And for all general and equitable relief, etc.

COOPER & SONNIER

BY: /s/ CHARLES R. SONNIER
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15TH JUDICIAL DISTRICT COURT

NUMBER: 35948

PARISH OF VERMILION, LOUISIANA

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

ANSWER

NOW COMES NORMAN VAUGHN, defendant herein, and for answer to plaintiff's petition, says that:

1.

Article 1 is denied for lack of sufficient information to justify a belief therein.

2.

Article 2 is denied.

3.

Article 3 is denied as written, Norman Vaughn further showing that the canals and other waterways referred to in this Article and at other points in plaintiff's petition are navigable waters, and navigable waters of the United States, and subject to a paramount right of use for and on behalf of the public and citizens of the United States and are not subject to private ownership or control.

4.

Article 4 is denied for lack of sufficient information and justify a belief therein.

5.

Article 5 is denied as written.

6.

Article 6 is denied as written.

7.

Article 7 is denied as written.

8.

Article 8 is denied as written.

9.

Article 9 is admitted as to the facts alleged therein.

10.

Article 10 is denied as written.

11.

Article 11 is denied as written and denied for lack of sufficient information to justify a belief therein.

12.

Article 12 is denied.

13.

Article 13 is denied as written.

14.

Article 14 is denied.

15.

Plaintiff's acts in attempting to restrain use by petitioner of any canals or waterways mentioned herein, and plaintiff's act in filing and maintaining this lawsuit, are both prohibited by the Rivers and Harbors Act, 33 U.S.C. 401, et sequittur, in that such attempts by plaintiff consti-

tute an obstruction to the navigable capacity of the navigable waters of the United States.

16.

Apart from any such statutory violations, plaintiff's attempt to restrain or impair or prohibit, via lawsuit or otherwise, the use by plaintiff or any others of the canals or other bodies of water mentioned herein is unlawful due to the character of said waters as navigable waters of the United States not subject to private ownership or dominion, but instead burdened with a paramount easement of use in favor of the public. All waterways mentioned in this lawsuit are subject to tidal fluctuations and/or are navigable in fact based upon their actual and potential uses as highways of commerce and fisheries.

17.

For the above reasons, plaintiff is without cause or right of action herein and has failed to state same in its petition. Plaintiff is also without cause or right of action as to its claim for damages based upon severance of shrimp and other fishes from its alleged private waters as, by specific provision of R.S. 56-311 and 312, said shrimp and fishes are not subject to private ownership, dominion or control.

WHEREFORE, defendant prays that this answer be deemed good and sufficient and after due delays and proceedings, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands with prejudice and at its cost.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ JOHN K. HILL
John K. Hill, Jr.
P. O. Drawer Z
Lafayette, La. 70502

15TH JUDICIAL DISTRICT COURT

NUMBER: 35,948

PARISH OF VERMILION, LOUISIANA

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

MOTION FOR SUMMARY JUDGMENT

Petitioner, VERMILION CORPORATION, through undersigned attorneys, and on suggesting to the court that defendant has filed his answer to the petition herein, and that plaintiff is entitled to a summary judgment against defendant, granting an injunction as prayed for in the petition, on the grounds that the pleadings and depositions on file, and the sworn affidavits annexed hereto or to be annexed hereto and served upon defendant, show that there is no genuine issue as to material fact, and that the questions presented herein are strictly a matter of law, and that mover is entitled to a judgment in his favor as a matter of law;

IT IS ORDERED BY THE COURT, that NORMAN VAUGHN, defendant herein, show cause on the 31st day of May, 1977, at 10:00 o'clock a.m., why summary judgment should not be rendered in favor of plaintiff as prayed for in plaintiff's petition herein.

THUS DONE AND SIGNED on this 16th day of May, 1977.

/s/ CARROL L. SPELL
Carrol L. Spell
Judge

15TH JUDICIAL DISTRICT COURT

NUMBER: 35,948

PARISH OF VERMILION, LOUISIANA

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

AFFIDAVIT OF MURPHY SELLERS

BEFORE ME, the undersigned Notary for the Parish of Vermilion came and appeared MURPHY SELLERS who after duly being sworn did depose and say:

That he is employed by VERMILION CORPORATION, petitioner in the above entitled lawsuit as its head warden to supervise use of its property including its canals, and that he has been employed by VERMILION CORPORATION and its predecessor, Louisiana Furs Corporation for a period of over thirty-five years. He is familiar with the canal system on the lands formerly owned by Louisiana Furs Corporation and now leased to VERMILION CORPORATION. He is aware of the fact that these canals on the lands leased to VERMILION CORPORATION were constructed by private corporations in connections with drilling operations on the property.

Appearer further declared that he has personal knowledge that the defendant in this lawsuit, NORMAN VAUGHN, has without the permission of VERMILION CORPORATION, trespassed on the lands and the canals located within said lands, on several occasions, and more particularly on or about June 26, 1975 in a canal at a point approximately one-forth of a mile north of Exxon Company Well #21, located in Section 26, Township 16 South, Range 1 West. Again, on or about July 18, 1975, defendant NORMAN VAUGHN trespassed at a point of approximately one-eighth

of a mile east of Exxon Company Well #46, located in Section 29, Township 16 South, Range 1 East. Appearer declared that he again saw the defendant trespassing on or about September 14, 1975, at a point located between two bridges constructed along what is known as the Humble Canal located in Section 31, Township 16 South, Range 2 East, and on or about September 24, 1975 he saw defendant at a point approximately one-half mile east of a cattle crossing on the Humble Canal located in Section 26, Township 16 South, Range 1 East. On each of these occasions he issued a written warning and notice to NORMAN VAUGHN that he was trespassing. These warnings were given to defendant in the form of legal notices, copies of which are attached to the petition in the lawsuit.

Appearer further declared that at the time of each trespass mentioned above and at other times not specified herein, he has seen NORMAN VAUGHN engaging in commercial fishing and/or shrimping operations in the canals leased to VERMILION CORPORATION resulting in the harvest of shrimp and fish of obvious value. Appearer further states that there are numerous "No Trespassing" signs posted throughout the property and along the entire canal system. To the best of his information there are at least four hundred or more such signs posted along the canals leased to VERMILION CORPORATION.

Appearer is further aware of the fact that VERMILION CORPORATION leases numerous tracts of property to hunters, granting them hunting privileges on the property and the use of the canals, to trappers granting them trapping rights on the property and use of the canals, and to commercial fishermen and alligator hunters, granting them the right to conduct specific activities on the property and use the canals, that VERMILION CORPORATION and its predecessor corporation Louisiana Furs, has been in constant control and supervision of the canals as long as he can remember,

and that he has personally evicted numerous persons who had no permission to use said canals in the past several years.

And finally, appearer declared that he has viewed the map of the property leased to VERMILION CORPORATION containing the numbers one through fifteen, together with the photographs which have been attached to the affidavit of Mr. John Donohue, and to the best of his knowledge those photographs properly depict only some of the scenes along the canals.

/s/ MURPHY SELLERS
Murphy Sellers

15TH JUDICIAL DISTRICT COURT

NUMBER:

PARISH OF VERMILION, LOUISIANA

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

AFFIDAVIT OF JOHN DONOHUE

BEFORE ME, the undersigned authority, personally came and appeared JOHN DONOHUE who after being duly sworn did depose and say:

That he is Vice-President, General Manager, and a member of the Board of Directors of Vermilion Corporation, petitioner herein, and has been associated with Vermilion Corporation and/or its predecessor corporation, Louisiana Furs Corporation, since 1958. Appearer declared that he is thoroughly familiar with the lands and canals leased to Vermilion Corporation by Louisiana Fur Corporation, (which has now merged with Exxon Company, U.S.A.), and that he is aware that these canals were constructed by private corporations with private funds, for the most part by Louisiana Fur Corporation, Humble Oil and Refining Company, Exxon Company, U.S.A., Vermilion Corporation, and Union Oil Company of California, usually in connection with drilling operations or mineral explorations on the lands leased to Vermilion Corporation.

Appearer further declared that the property and canals within the area designated on the attached map, which was marked D-1 for identification with his deposition previously taken, has been under the continuous control, possession, and supervision of Vermilion Corporation and its predecessor corporation, Louisiana Furs Corporation, since the

1920's, and that the use of the canals on said subject property has always been subject to the permission and supervision of petitioner and its predecessor corporation.

Appearer further declared that for decades Vermilion Corporation and Louisiana Furs Corporation has granted leases on the subject property to various hunters, trappers, alligator hunters, and fishermen, granting them specific privileges on said property and the right to use the canals in connection with those premises. A copy of a hunting permit normally used in connection with said hunting leases is attached hereto and marked as A-17. Of the 125,000 acres under lease to Vermilion Corporation, approximately 120,000 acres are presently under lease to hunters, trappers, alligator hunters and fishermen and these persons pay for their leases and the right to use said canals. Vermilion Corporation has maintained over four hundred "No Trespassing—Vermilion Corporation" signs along the canals which are the subject of this lawsuit, and has continuously employed persons to supervise activities in those canals. On numerous occasions Vermilion Corporation has had to exercise its control by prohibiting persons from entering and using the canals. Vermilion Corporation has on several occasions successfully pursued injunction suits prohibiting persons from entering its property including the canals.

Appearer further declared that he has reviewed the map attached hereto and identified as A-16, containing numbered locations one through fifteen, and that he has further reviewed the corresponding photographs attached hereto and marked for identification as A-1 through A-15, and he further declares that he is the person who took these photographs and that they represent a true picture of the scenes at some of the entrances to some of the larger canals in Vermilion Corporation's canal system, and that they show many of the "No Trespassing" signs which are posted

throughout the property. The photographs were taken at locations one through fifteen on the map in question, and more particularly in the locations described as follows:

Photograph number one was taken at a Union Oil Well location at the Stomp entrance; photograph number two was taken at the entrance to a Humble location canal from Freshwater Bayou; photograph number three was taken at the entrance to a Union #1 well canal from South Freshwater Bayou; that photograph number four was taken at the entrance to Union well canal #2 at South Freshwater Bayou; that photograph number five was taken at the north bank of the Humble Pecan Island canal near Freshwater Bayou; that photograph number six was taken at the south bank of the Humble-Pecan Island canal near Freshwater Bayou; that photograph number seven was taken at the trunkline pipeline canal at its intersection with the Humble canal, south bank; that photograph number eight was taken at the entrance to the Pan American pipe line canal from the Humble canal, on its south bank; photograph number nine was taken at what is known as the Union canal-Columbia Gulf-Humble canal crossing, on the north bank; that photograph number ten is the west view of the Humble canal-Union canal intersection; that photograph number eleven was taken at the Columbia Gulf barge terminal-south, along what is known as the Union canal-Section 14; that photograph number twelve was taken at a Humble-Exxon location, canal well #10, north view; that photograph number thirteen was taken at the Humble canal at the Humble landing at Pecan Island; photograph number fourteen was taken at the intersection of what is known as the Humble canal and the Dewit Canal, south view; that photograph number fifteen was taken along what is known as the Humble Canal.

/s/ JOHN DONOHUE
John Donohue

EXHIBITS ATTACHED TO MR. DONOHUE'S AFFIDAVIT

Exhibits attached to Mr. Donohue's Affidavit appear at Pages 60 through 64 of the original record in the Vaughn case on file in this court.

DEPOSITION OF JOHN DONOHUE

SUIT NO. 35, 948
15TH JUDICIAL DISTRICT COURT
PARISH OF VERMILION, LOUISIANA

VERMILION CORPORATION
VS.
NORMAN VAUGHN

SUIT NO. 36,983
15TH JUDICIAL DISTRICT COURT
PARISH OF VERMILION, LOUISIANA

VERMILION CORPORATION
VS.
LARRY BROUSSARD

SUIT NO. 36,982
15TH JUDICIAL DISTRICT COURT
PARISH OF VERMILION, LOUISIANA

VERMILION CORPORATION
VS.
FREDDIE BROUSSARD

APPEARANCES:

FOR THE PLAINTIFF:
CHARLES SONNIER, ESQ.
JOHN ORTEGO, ESQ.
COOPER & SONNIER
221 East St. Victor
Abbeville, Louisiana 70510

FOR THE DEFENDANTS:

JOHN KNOX HILL, JR., ESQ.
MOUTON & ROY
Post Office Drawer Z
Lafayette, Louisiana 70502

EXHIBITS ATTACHED TO DEPOSITION:

"D-1"—A document which purports to portray the property boundaries of the leasehold, as well as points of interest concerning activity on the property.

"D-2"—A document which purports to portray the canal system of the Exxon Company, USA, oil and gas field, known as the Pecan Island Field, Vermilion Parish.

"D-3"—Copy of a Humble property map. (Not attached)

"D-4"—Entry numbers to servitude instruments.

STIPULATION

It is stipulated by and between counsel for the plaintiff and counsel for the defendants as follows:

That the deposition of JOHN DONOHUE shall be taken upon oral examination, pursuant to the Louisiana Code of Civil Procedure, before Vernelle P. Herbert, General Reporter and Notary Public, duly commissioned and qualified in and for the Parish of Lafayette, Louisiana, beginning at 2:15 o'clock, P.M., May 10, 1977, at the offices of Cooper and Sonnier; 121 East St. Victor, Abbeville, Louisiana;

That the parties hereto waive all formalities in connection with the taking of this deposition, including the reading and signing thereof by the witness, except the swearing of the witness and the reduction of the testimony to typewriting;

That all objections except those pertaining to the form of the question, need not be entered at the time of the taking of this testimony, but may be reserved until such time as this deposition or any part hereof may be offered in evidence, with the same effect as though the evidence

had been taken and given on the trial of this case in Open Court;

Further, by agreement of counsel, that the witness may be sworn by the reporter.

PROCEEDINGS

JOHN DONOHUE, called at the instance of the defendants, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. HILL.

Q. Your name is John Donohue?

A. That is correct.

Q. What is your professional address, sir?

A. Post Office Box 554, Abbeville.

Q. And your occupation?

A. I'm a C.P.A. in public practice.

Q. All right. And what is your connection with the Vermilion Corporation presently?

A. I am presently the vice president, general manager, treasurer, and a member of the Board of Directors.

Q. How long have you held the positions of V.P. and general manager of the Vermilion Corporation?

A. Since September 1, 1971.

Q. Were you affiliated with the Vermilion Corporation prior to that time?

A. Yes, I was.

Q. In what capacity, sir?

A. I served as treasurer, auditor and treasurer of Vermilion Corporation on August 1, 1958.

Q. Continuously to September, '71?

A. That's correct.

Q. Who was the general manager who preceded you?

A. Mr. J. Mark Hebert.

Q. Is Mr. Hebert still here, is he alive?

A. Yes, Mr. Hebert is still living. He lives in Lafayette.

Q. How long was he the general manager of the Vermilion Corporation?

A. Approximately, forty-five (45) years.

Q. So, there have only been two (2) of you?

A. Prior, there was a general manager, prior to Mr. Mark Hebert. Well, now, of course, I'll have to amend that to this extent, that Vermilion Corporation was formed on April or March 28th of 1959——1958, excuse me. March 28, 1958. And prior to that time, Mr. Hebert served as general manager of Louisiana Furs Corporation, which was a predecessor corporation. Vermilion Corporation succeeded Louisiana Furs Corporation.

Q. What, if any, affiliation with, or relationship to the Exxon Corporation or its predecessors did Louisiana Fur have?

A. Affiliation?

Q. I use that term in its broadest sense.

A. None to my knowledge, other than——well, I would have to say to this extent, that the predecessor to——which is now Exxon Company, USA, was Humble Oil and Refining Company. And Humble Oil and Refining Company held mineral leases on Louisiana Fur property.

Q. What, if any, relationship presently exists between the Vermilion Corporation and the Exxon Company?

A. Vermilion Corporation operates on a ninety-nine (99) year service lease granted by Louisiana Furs Corporation. Louisiana Furs Corporation was merged into Humble Oil and Refining Company, and later merged in with Exxon Corporation.

Q. So, Louisiana Fur owned the land that Louisiana Fur leased to Vermilion Corporation, and then, Louisiana Fur was merged into the predecessor of Exxon Company, USA?

A. That is correct.

Q. All right. Can you describe for me, orally, verbally, the various bodies of water to which the Vermilion Corporation's petitions in these three (3) lawsuits refer?

A. They refer to the canal system on the leasehold on the property.

Q. Generally speaking, that would be from Freshwater Bayou to the Dewitt Canal east to west, and from the gulf to, roughly, Pecan Island north and south?

A. That would be——no. That would be from the West Cheniere Tiger Canal on the east to Rollover Bayou on the west and north and south from the Gulf of Mexico north to the Intracoastal Canal. In the area of Intracoastal City, we have some land that are north——located north of the Intracoastal Canal.

Q. Am I correct that the canal system of which we are primarily speaking in these three (3) lawsuits, although not exclusively lying in the area that I described a few moments ago, does primarily lie in that area; that is, once again, from Freshwater Bayou to the Dewitt Canal, and from the gulf to Pecan Island?

A. And the question was does the canal system lie principally?

Q. Yes, principally and primarily?

A. Well, I'd say, the bulk of it is in that particular area, but there's quite an extensive canal system outside of that area.

Q. Okay. Do you have with you, today, maps or plats of which depict the entire canal system of which you speak?

A. Yes, I do. The entire canal system——I think it would encompass most of the canal system.

Q. Let me see.

A. It would consist of two (2) plats, really. The area you were speaking of really would be one (1) area of this particular property map, which is a——that's a visual aid map that I have prepared for my stockholders for points of interest on the property.

OFF THE RECORD.

A. Now, these are all numbered. All of the canal system within the area you're speaking of, they're all numbered well location canals.

MR. HILL.

Q. Okay. The document I am going to mark "D-1," which you have handed to me, tell me, if you will, what that purports to portray, sir.

A. That purports to portray the property boundaries of the leasehold, as well as the points of interest concerning activity on the property.

OFF THE RECORD.

MR. HILL.

Q. Okay. Mr. Donohue, in connection with what I believe you just told me, Exhibit "D-2" purports to portray what?

A. That portrays the canal system of the Humble Oil ——Exxon Company, USA, oilfield, oil and gas field, known

as the Pecan Island Field, Vermilion Parish. That's just Humble Oil and Refining Company——I mean, it's Exxon Company, USA, a division of Exxon Corporation.

Q. All right. Do you have additional maps or plats which further reflect the existence of canals on the leasehold?

A. I have one (1) other map, which is a property map, prepared by Exxon Corporation——Exxon Company, USA. This shows all the section numbers, townships, range lines. That is the current property map of the property. It also shows ownerships.

OFF THE RECORD.

MR. HILL.

Why don't we——we're all among friends——just call that current Humble property map Exhibit "D-3," and not attach the original, and simply have Mr. Donohue provide the court reporter with a copy of it to be attached to the deposition.

You can just provide it directly to Mrs. Hebert.

Q. Among Exhibits "D-1," "D-2," and "D-3," the entire canal system referred to in these three (3) lawsuits is at some point portrayed?

A. Well, I'd have to qualify that to the extent that current drilling locations are now being dredged, and are continuously being dredged month by month. In other words, this is not an update. The closest thing to the update would be the——I think you called it "D-1" of the Exxon Field. Exxon is not the only producer on the property. We have Union Oil Company of California, we have Robert Mosbacher, we have Amoco, we have Austral, we have other companies that are continuing to enlarge the canal system.

Q. Yes.

A. On a current basis. So, I don't have an update that I can say shows every existing canal on the property at the moment.

MR. SONNIER.

Let me make an observation, not an objection for the record, but witness is being asked to identify the land area with reference to the canal system. I think the best evidence of that would be the pleadings themselves and the attachment to those pleadings, which include the areas that are being claimed by the plaintiffs as being under their supervision and control and ownership, and subject to the injunction being sought. And with that preface, I will tell John he can continue answering that question.

A. The point I was making was this is an active oilfield, oil and gas field in this whole area, and then, the canals are continuously being dredged for access to the nearest drilling locations.

MR. HILL.

Q. All right. In Article 5 of the suit against Norman Vaughn, it is alleged that Mr. Vaughn's trespass, alleged trespass, took place in the canal "at the point approximately one-fourth mile north of Exxon Company, Well No. 21, located in 26:16:1." Can you tell me when that canal was dredged, dug or developed, or that portion of the canal?

A. I would have to refer to the map to see the date of the completion of those wells to answer that question specifically. 21, that canal was extended from F-1 up to and across the little hunting canal, the little Louisiana Fur Canal. If you'll look at 21, there should be the day of completion of that well on it. I would have to say it was done in the late '60s. The expansion of the canal system has been a continuing one, and it shows what exact dates would be, with that reference of being possible.

Q. Generally speaking, the——and realizing that it doesn't purport to be precise, we're probably talking about the late '60s for that portion of the canal that I mentioned, or that was mentioned in Article 5, Well 21, in Section 26:16:1.

A. As a matter of fact, it hadn't been dredged at the date of printing of this property map. Yes, it had. There it is right here, 21. I was looking at the wrong place. May, '57 was date of completion, on extension from F-1.

Q. I just want to make sure I follow you correctly. That canal was completed in May, '57?

A. No, the well was completed.

Q. The well was completed.

A. So, that canal would have been——the duration of a well is normally about three (3) months. So, the canal would have been dredged just prior to spudding in the barge on that location.

Q. In Article 6 of the petition, there's mention of an alleged trespass in one-eighth mile east of Exxon Well No. 46, located in 29:16:1. Tell us approximately when that portion of the canal system was developed.

A. Well, that portion is part of the older canal system, which dates back to 1943, at which time Humble Oil and Refining Company drilled Well No. 3. And then, of course, that was the area he was observed in, just adjacent to that Well No. 3——it was between 3 and 46.

Q. All right. Going on to Paragraph 7, the Humble Canal is the portion of this thing running south from Broussard's Landing?

A. The Humble Canal is the entire——(Interrupted)

Q. I realize that, but let me just read you Paragraph 7. "Again trespassed on or about September 14, '75 at a point

located between two (2) bridges constructed across what is known as the Humble Canal, located in Section 31:16:2."

A. Well, I think there we're referring to the Humble main canal, access canal, from which the various location canals branch off. That canal system would consist of starting at Pecan Island coming down from the Humble Landing at Pecan Island——now Exxon Landing, and continuing south to a Y juncture, which junctures off to the southeast and southwest, southeast over to Freshwater Bayou, southwest over to the Well 21 juncture, back to the little canal. That would be the Humble main——what we refer to as the Humble main canal system, off of which all of these——and, of course, this evolved as various locations were being drilled, new well sites. This was not all done at one time. This has been an evolving canal system.

OFF THE RECORD.

MR. HILL.

Q. The portion of the canal referred to in that paragraph was developed approximately when, sir?

A. Between the two (2) bridges, the reference?

Q. Yes.

A. That was done in 1942. That part of the Humble main canal——I mean, Humble canal system was dredged in 1942.

Q. Okay. The next paragraph refers to an alleged trespass "at a point approximately one-half mile east of a cattle crossing on the Humble Canal, located in 26:16:1." Approximately when was that portion of the canal developed, sir?

A. You'll have to repeat that.

Q. One-half mile east of a cattle crossing on the Humble Canal, located in 26:16:1——Section 26, Township 16 South, Range 1.

A. That would have been dredged at the same time as ——in 1942.

Q. All right. In Article 5, the Larry Broussard suit, it says, "Reference to an alleged trespass at a point designated as Location 22, located in Section 31, Township 16 South, Range 1 East," when was the portion of the canal system referred to in that paragraph developed, sir?

A. Let me locate that.

Q. It's Location 22, Section 31, Township 16.

A. That would have been done in approximately 1946, 1947, in that time.

Q. Okay. The next one, Well Location 21, Section 26, Township 16 South, Range 1 East, when was that portion developed?

A. 1 East or 1 West?

Q. 1 West. I'm sorry. Excuse me.

A. Section 26——(Interrupted)

Q. 26:16:1 West, Location 21.

A. Location 21. That's the 1957 date.

Q. Okay. All right. In Article 5 of the Freddie Broussard petition, in that article there is mention of an alleged trespass "in a canal at a point designated as Humble Canal, Location 13, located in Section 33, Township 16 South, Range 1 East," when was that portion of the canal system developed?

A. In '47 and '48. 1947 and '48.

Q. All right. Do I assume correctly that all of the locations which I've just asked you about, which, I believe, constitute all locations mentioned in all three (3) petitions,

are parts of canals built by, or caused to be built by Humble?

A. By Humble?

Q. Yes. By Humble, or someone in privy with Humble?

A. Yes. Because Union of Cal participated in some of that canal construction. Union Oil Company of California.

Q. Within the boundaries of the leasehold, shown in Exhibit "D-1," can you tell me the earliest dates at which any canals, to your knowledge, were developed by Louisiana Fur or Humble?

A. The earliest dates?

Q. Yes, sir.

A. It would have been in the 1945——no, it was prior to that, 1942 period.

Q. Is there any portion of the entire canal system developed by Louisiana Fur and/or Humble, and/or Exxon, and/or the Vermilion Corporation——is any portion of that canal system within the boundaries of the leasehold shown in Exhibit "D-1," which is hermetic, or enclosed; that is, which is not ultimately connected to some other waterway? Do you follow what I'm saying?

A. Well, there are many dead end location canals.

Q. Dead end, though, on only one (1) end, correct?

A. Correct.

Q. In other words, there is no portion of the canal system referred to in Exhibit "D-1" in which is involved in this lawsuit that is dead ended, or enclosed on both ends, if you will, is that correct sir?

A. On both ends?

Q. Yes, sir.

A. No. Not enclosed on both ends, no. You would mean by that a dammed off location canal?

Q. Yes, I think, correct, or, in essence, an artificial lake, I suppose, in other words, a completely enclosed waterway.

A. Well, there are some——I'll have to——there are one (1) or two (2) that are dammed off location canals, yes. For example, there's a Kilroy location in '61, this was dammed off here.

Q. All right. That's in Sections 25 and 36, Township 16 South, Range 1 East, correct?

A. Correct.

Q. Those——that location, to your knowledge, is not directly involved in this lawsuit, involved from the standpoint of there being an allegation of a trespass in that area?

A. No.

Q. All right. Any others that fit that description?

A. That are dammed——that would be dammed off locations?

Q. Yes.

A. That just comes to my mind right offhand, that particular one. We have pipeline canals that are dammed off, yes. Not location canals, but pipeline floatation canals that are dammed off.

Q. Are any of those, to your knowledge, directly involved in this lawsuit; that is, from the standpoint of there having been an alleged trespass on them by any of the three (3) defendants?

A. No.

MR. SONNIER.

Let me make another observation. Of course, the pleadings and the request for whatever remedy the Court is to

grant is set forth in the petition and the prayer, regardless of what this witness has indicated. In other words, John, our contention is the Vermilion Corporation has control over the entire land area shown in that "D-1" that you have, whether it's enclosed, or otherwise.

MR. HILL.

I understand.

OFF THE RECORD.

MR. HILL.

Q. Has there been any discussion between the Vermilion Corporation and the Corps of Engineers recently about dredging, or possible dredging of the Dewitt Canal?

A. No.

Q. To your knowledge, does the Corps have any plan or intention to do so?

A. Not to my knowledge. I haven't been contacted about it by anyone about dredging the Dewitt Canal.

OFF THE RECORD.

MR. HILL.

Q. Could you tell us what is known as the Dewitt Canal?

A. The Dewitt Canal is a canal that was dredged by Louisiana Furs to connect the little Mulberry Canal northward to the little Louisiana Fur Canal, which were the original access canals over the property, and that was for trapping and hunting access over the marsh.

Q. All right. And the Dewitt Canal was developed approximately when, sir?

A. In——about in 1945.

Q. There was in the approximate area of the Dewitt Canal once a natural waterway or bayou, known as the little Freshwater——little Rollover Bayou, was it not?

A. Yes, sir. There was a little coulee out there called Little Freshwater Bayou. It was a drainage coulee that meandered from the coast in a northwesterly direction up into a lake area. It was there. It is all silted in now, filled in.

Q. Do you know the cause of its being silted in, filled in?

A. Well, the general conditions along our coast, which is that of accretion caused by the westerly current and bringing the silt from the Atchafalaya River westward, is causing the silting up of all the canal openings into the gulf off of our coast.

Q. To your knowledge, did the development of the Dewitt Canal itself have anything to do with the silting up and the enclosure of that coulee to which you refer?

A. No, it would not have had any effect on that, to my knowledge.

Q. Do you know whether or not that little coulee course northerly as far as Pecan Island, or the latitude of Pecan Island?

A. I wouldn't know that for a fact. The best of my knowledge, it drains the lake areas located in 16 South 1 West. It meandered this way. It came in at about this point, it meandered, and crossed, and came over into a low area in here. It was some lakes at that time. And then, it course northward into this lake area. And it drained those lakes into the——(Interrupted)

Q. To your knowledge, in other words, the northern most lake area in which it coursed was in the southeast quartan of Township 16 South, Range 1 West, approximately, correct?

A. Yes. That whole Township.

Q. Okay. 16:1?

A. Yes.

Q. Do you know the——or can you tell us the approximate size of that little canal?

A. The Dewitt Canal?

Q. The natural canal or coulee that once existed in that area.

A. No, I can't give you the dimensions on it. I have observed it on Toban aerials what remained——well, an aerial that was taken in 1958 by Humble at that time, at the time of acquisition of the property and the merger with Louisiana Furs. And at that time, it's not too well defined. It aided the Rollover Bayou. It was a drainage that aided Rollover Bayou and drainage for that area.

Q. To your knowledge, was it ever used by vessels of any description for any purpose?

A. Well, about the only vessel I could say ever used it were trappers in perogues using it for trapping in that area. Dewitt Morgan, after whom the canal was named——of course, canal names have a funny way of originating, you know. That happened to be where Mr. Dewitt Morgan, one of our trappers was trapping at the time and for many years, and the canal becomes known as the Dewitt Canal.

Q. Freshwater Bayou, am I correct that it once coursed northerly from the gulf, the natural Freshwater Bayou?

A. Unh-huh (yes).

Q. Well, it yet courses northerly from the gulf almost to Pecan Island, does it not, the natural waterway?

A. The natural waterway, no. The natural waterway is all filled in.

Q. Did it once course northerly from the gulf to Pecan Island, to the eastern terminus or tip of Pecan Island, if you know?

A. Yes, it did. It terminated at what we refer to as Boat Point on the eastern tip of the front ridge of Pecan Island.

Q. All right. While the situation existed, to your knowledge, was the natural Freshwater Bayou used for any navigational purposes, and I don't mean navigational in a legal sense, I mean just factually?

A. To my knowledge, I would have to——I don't have knowledge of that, and I would assume that it was.

Q. How old are you, Mr. Donohue?

A. I'm fifty-three (53)——will soon be fifty-three (53) this month.

Q. By whom was the Freshwater Canal developed?

A. The Freshwater Canal?

Q. Yes, sir.

A. What's presently existing as Freshwater Canal was developed by the Corps of Engineers, under a servitude that was granted by Exxon—well, Humble at that time. I'm not sure if it was Humble or Exxon at that time. And Vermilion Corporation donated a servitude for the construction of Freshwater Bayou Canal.

Q. Do you have a copy of the instrument whereby that was done?

A. I have a copy at the office. I don't have it with me.

Q. Okay. Could you also forward a copy of that to Mrs. Hebert to attach to the deposition? This is a servitude instrument.

MR. SONNIER.

Is it lengthy, John?

A. It's fairly lengthy. I just got a copy of it one (1) or two (2) years ago from the Courthouse.

MR. SONNIER.

Most of those things cover——you know, because it covers all of the——(Interrupted)

A. The property description is quite lengthy.

MR. SONNIER.

We don't mind getting one. It's a public record.

MR. HILL.

If you could just simply provide the court reporter with the entry number, and call that entry number "D—4".

A. All right.

MR. SONNIER.

I will provide it for the reporter.

It is agreed between the parties to the deposition that it be incorporated by reference.

MR. HILL.

Q. All right. The Freshwater Canal which is on the map which is Exhibit "D—3," show me, if you will, the Freshwater Canal.

A. The Freshwater Canal is outlined where it flows into the Gulf of Mexico.

Q. And that's in 24:17:1?

A. 24 and 17:1. And it courses northward to the lock side in Section 13——17:3:1 East. All right. And then, it flows northward to Section 31: 16 South: 2 East, and it takes a northeasterly bend—how far do we want to go? Up to its ——(Interrupted)

Q. All the way to its terminus.

A. All right. 15——Section 22 in 15 South, 2 East, at which point it takes a further northeasterly bend to Intracoastal City, to the Intracoastal Canal, in the vicinity of Intracoastal City.

Q. What, if you know, existed——the Corps developed that canal, or improved it, or whatever, approximately when, sir?

A. In the period between 1964 and 1968 at which time it was opened.

Q. What existed along the course of that present canal prior to the Corps working that area?

A. Prior to the Corps dredging——completion of the Freshwater Bayou Canal, there existed the Six Mile Canal, what was known as the Six Mile Canal, which started at Schooner Bayou, our old Intracoastal waterway, and proceeded south to a juncture with Belle Isle Bayou.

Q. All right. So, that was generally between 10 and 11 ——Township 15 South, Range 2 East, down to the southern portion of, roughly, Section 4:16:2, is that right, sir?

A. That would be right.

Q. All right. Go ahead, sir. I interrupted you.

A. Then, from that point south there was the Belle Isle Canal, which flows southward to its juncture with Freshwater Bayou.

Q. And the Belle Isle Canal, the juncture of that with, I suppose, the natural Freshwater Bayou?

A. With the old Fresh——natural Freshwater Bayou.

Q. All right. On approximately——on the 16:2 and 17:2 Section line in the area of 31:16:2, is that correct, sir.

A. That would be right. Well, 28:17:2.

Q. Okay. Freshwater Bayou is natural. What about the Belle Isle Canal?

A. The Belle Isle Canal was dredged to connect the Six Mile Canal with Freshwater Bayou.

Q. Dredged by whom?

A. It was dredged by Humble Oil and Refining Company and Union Oil of California.

Q. When?

A. This was done in approximately 19——either late ——it would be late '41 or '42.

Q. The Six Mile Canal was developed by whom, sir, and when?

A. That was developed by Union Oil of California and the Humble Oil and Refining Company at the same——approximately the same time, in 19——in late '41 and '42 period——1941 and '42 period. That was the time when the oil activity started on the property.

Q. Well, that's what I was going to say. Am I correct that those two (2) dredging operations were, if not the first, among the very first in this area?

A. Yes. The Six Mile Canal and Belle Isle Canal.

Q. Six Mile Canal and Belle Isle Canal were, as a matter of fact, navigated by what sort of vessels, sir?

A. Navigated by oilfield vessels, drilling barges and support vessels, towboats and tugboats and crew boats, and by Louisiana Furs' work boats.

Q. And the combination of Six Mile, Belle Isle, and the old Freshwater Bayou made the entire area from the old Intracoastal to the gulf navigable for those vessels?

A. I wouldn't say they made it completely navigable to the gulf, because Freshwater Bayou was silting up from its juncture with Belle Isle Canal to the gulf.

Q. Was there ever a time when that entire area was navigable by the work of industrial vessels that you just mentioned?

A. From the juncture to the mouth of the gulf?

Q. Yes.

A. Not to my knowledge.

Q. What vessels were——or what sorts of vessels was that entire area navigable?

A. It was navigable by oilfield work vessels from the Schooner Bayou juncture with Six Mile Canal to the Freshwater Bayou juncture with Belle Isle Canal by work boats entirely, to the point. Now, from the juncture of Belle Isle Canal with Freshwater Bayou and southward to the gulf, I really couldn't tell you what type of vessels could navigate that, if any.

Q. Are you aware of that waterways formed by the joining of the three (3) waterways that we have been speaking of——are you aware of that ever having been used as a mail route, or a route to move cattle north and south?

A. Movement of cattle north and south, or a mail route?

Q. Yes.

A. I wouldn't be familiar with it as a mail route, but as a cattle movement route, yes, our cattle lessees were permitted to move their cattle through that canal system by barge, our grazing lessees.

Q. Now, there are two (2) landings at Pecan Island that is commercial landings, are they not—Broussard's and Hazel's?

A. Yes, sir.

Q. And they're both at headwaters, if you will, of your canal system, right?

A. Yes. Headwaters? I don't know just what you mean by that.

Q. Perhaps that's a misnomer. Perhaps you should just show me on Exhibit "D—3" where Hazel's and Broussard's Landings are.

A. Hazel's Landing is marked clearly in Section 34.

Q. All right. That's 34:15:1.

A. 1 East.

Q. All right.

A. And Broussard's Landing is located at the juncture of the Humble Canal with the front ridge on Pecan Island in Section 8 in——(Interrupted)

Q. 16:1?

A. Yes.

Q. 16:1 East. How long, to your knowledge, have Hazel's Landing and Broussard's Landing been in existence?

A. Broussard's Landing has been there for quite some time. I just couldn't give you an exact year on it. Hazel's Landing was developed relatively early——I mean, pardon, not early, late. Hazel's Landing was developed in about '59, or thereabout——'58 or '59.

Q. Okay. And Broussard's, some time before that?

A. Broussard's, some time prior to that.

Q. When Hazel's Landing was originally opened, to your knowledge, were its physical facilities located on land owned by the Vermilion Corporation, or Humble, or Louisiana Fur, or on the other hand, by lands owned or leased by the developer of the land?

A. Well, it was developed on lands owned by the Segrera heirs——R. S. and I. W. Segrera heirs.

Q. Was Louisiana Fur, the Vermilion Corporation, Humble or Exxon in any way privy to the development of that landing, to your knowledge?

A. Not to my knowledge, at all.

Q. How about Broussard's Landing, that was developed on land owned at that time by whom, to your knowledge?

A. By Mr. Hester Broussard.

Q. All right. Were any of the corporations I just mentioned, the Vermilion Corporation, Et Al, in any way privy to that landing's development?

A. Not to my knowledge. I know that Humble Oil and Refining Company leased some ground from the Broussard ——from Mr. Lester Broussard for the development of the Humble Landing.

Q. Okay. That's on the west side of the landing, and the Broussard physical premises are on the east side of the landing.

A. Yes.

Q. Was there ever a time when, to your knowledge, Louisiana Fur——and I mention all these names, simply because, Mr. Donohue, I don't have the relevant dates of change-overs in my mind. Was there ever a time that Louisiana Fur, Humble, Exxon, or the Vermilion Corporation sought to restrain or prohibit the operations of Hazel's Landing or Broussard's Landing?

A. The operation of the landings?

Q. Yes, sir.

A. Not to my knowledge.

Q. Both of those landings are——(Interrupted)

A. Now, you say sought to restrain, is that correct?

Q. Yes, restrain, or prohibit, or interdict, whatever one wants to say, or has there ever, to your knowledge, been any intent to tell the people in so many words, "You can't operate your landing here because this is our private waterway."?

A. Not to my knowledge.

Q. The area of your canal system, generally, from the Dewitt Canal to Freshwater Bayou west to east and Pecan Island to the gulf north and south, is navigated, in fact, by what sorts of vessels predominantly owned by whom ——owned, or leased, or chartered by whom?

A. Well, it's navigated predominantly by vessels belonging to Exxon Company, USA, and vessels belonging to Vermilion Corporation.

Q. And what sorts of vessels are those?

A. They are work boats and passenger——and patrol boats, and passenger carrying boats. It's also navigated by our lessees, our hunting lessees, during the hunting season, during the waterfowl hunting season. It's navigated by our trappers who trap the lands, during the trapping season. It's navigated by our alligator hunters who hunt alligators during the hunting season.

Q. You say our alligator hunters. In what sense do you mean our, sir?

A. In that we contract with the trapper to hunt alligators in designated areas, on the property.

Q. Designated areas as far as hunters and trappers outside the boundaries of the waterways.

A. Including the waterways. Most of the alligators——(Interrupted)

Q. Well, in other words, lands within and without the waterways.

A. Correct. Most of the trapping and the alligator hunting is done in the canal system.

Q. Since Broussard's Landing and Hazel's Landings have been open for business, to your knowledge, do members of the public, from sport fishermen, for example, use those landings to put boats in and take them out——(Interrupted)

A. Yes, sir.

Q. ——without the permission of Exxon, the Vermilion Corporation, Humble, or Louisiana Fur?

A. Does the public sportsmen use the two (2) landings?

Q. Yes.

A. Yes, they do.

Q. From Broussard's Landing, using your canal system in conjunction with other waterways, one can go south and thence west and thence south in a small vessel to the gulf through the Dewitt Canal, is that correct, sir?

A. Not presently, no.

Q. Well, up until a couple of weeks ago, could one do that?

A. Well, the Dewitt Canal is silted up at the mouth, outward for a distance of about two hundred or three——oh, I'd say, five hundred yards. A bar has been built.

Q. In the gulf itself, when did that, by the way, as a matter of curiosity, when did that bar reach a stage of development that navigation by small vessels became impossible, approximately?

A. Oh, it's been a gradual build-up over a long period of time, and just by traffic, they were able to cut their way through it.

Q. Is it to the point now that small boats simply can't make it through at all, or do they still manage by force to get through there?

A. I would say it's impassable at the present time.

Q. I gather from your testimony that situation of complete impassibility has not lasted too very long; that is, rather recently——(Interrupted)

A. The complete impassability would have occurred within the last six (6) months, I would say, to a year.

Q. One can go from Broussard's Landing south and thence east and ultimately back to the south and to the gulf by the Freshwater Canal and Bayou or northerly to the Intracoastal Canal, is that correct, sir?

A. That's correct.

Q. One can generally do the same——perform the same functions from Hazel's Landing, can one not?

A. That's correct.

Q. Are there any other——and this is a loaded word, and I know it, but prominant natural or artificial waterways other than the gulf and the Intracoastal Canal that portions of your canal system connect with?

A. You'll have to repeat that, Mr. Hill.

Q. Okay. Other than the gulf and the Intracoastal Canal and Freshwater Canal, are there any other prominant natural or artificial waterways with which any portion of your canal system connects?

A. Well, we have some canals that connect with the old Intracoastal Waterway into White Lake.

Q. All right. Any others?

A. No. We have some——I'll have to retract that statement. We have a canal system that connects with the West Cheniere Tiger Canal and into Vermilion Bay.

Q. We've been speaking of a canal system, realizing that there are many dead ends. Are we, nevertheless, speaking of one unitary system; that is, there is not one system of cuts and canals that are hermetically sealed from another, or another system of canals? Do I make myself at all clear?

A. I think so, Mr. Hill. Of course, you know, these canals are all developed as the most expeditious means and way to get to a drilling location. So, they all connect to some other canal, which in turns connects to another canal, which eventually leads to Intracoastal City or the Gulf of Mexico.

Q. So, it is, in effect, ultimately a unitary system in that sense, am I correct?

A. Well, I don't know what you mean by unitary there again, but I can only answer it the way I did.

Q. The development of that canal system, has there ever been any arrangement, or connection, between the Vermilion Corporation, Humble, Exxon, and Louisiana Fur on the one hand, and the Corps of Engineers on the other, other than the easement agreement which you've already referred to?

A. Yes. Humble Oil and Union Oil Company of California, the oil producers on the property, have dealings with the Corps of Engineers relative to obtaining permits for dredging these location canals, these oilfield location canals, and for the placement of pipeline on the property.

Q. Is it generally true that there has been a——from the time this canal system was first begun to be developed in the early '40s, is it generally true that on each occasion that any portion of it was developed, a permit was secured from the Corps of Engineers to do so?

A. Repeat that question, please, Mr. Hill?

Q. Is it true that from the time this canal system was begun to be developed, that at each stage, or each point in

the development, a permit from the Corps of Engineers was secured before doing so?

A. I don't think so. You know, the——I think it's only been in recent years that the oil companies have made application to the Corps of Engineers for permits for dredging oilfield location canals.

Q. Simply in the last four (4) or five (5) years?

A. Since 1974.

Q. Prior to that time, were such permits sought and obtained, to your knowledge?

A. I don't have knowledge of that, Mr. Hill. I can't answer that.

Q. Other than——forgetting pipelines for the moment, to your knowledge, from the development——from the time of the beginning of the development of the canal system in the early '40s until 1974, on each occasion of dredging or development of portions of the canal system, was there any permit sought from any agency or subdivision of the United States or State government before doing so?

A. There again, I can't answer the question for the oil companies that were developing the canal system. And I just can't tell you whether——what the procedure was at that time.

Q. Is there, to your knowledge,——(Interrupted)

A. I would have to assume that any work done on natural waterways would have——permits would have been obtained, which was, at that time, to my knowledge, the limitation of the Corps of Engineers' jurisdiction.

Q. To what extent is this canal system effected by tidal fluctuations?

A. Tidal action was increased substantially by the dredging of the Freshwater Bayou Canal, complete hydrology

of that whole project area was effected by the dredging of the Freshwater Bayou Canal. The Freshwater Bayou Canal was dredged to initial depth of twelve (12′) feet by a hundred and twenty-five (125′) feet width. This replaced the canal system of essentially——with dimensions of essentially forty (40′) feet wide by six (6′) feet deep. So, this changed the hydrology quite substantially with the dredging of the Freshwater Bayou Canal. Tidal action was changed at that time. Prior to that time, there was no great fluctuation in tidal action over the property.

Q. I certainly don't want to quibble with you about adjectives, but was there prior to the development of the Freshwater Canal some tidal fluctuation, or some degree of effect by tidal fluctuations in the canal system, generally?

A. Oh, yes. There was a tidal action in the canal system, not as severe as there is at present, as a result of the dredging of the Freshwater Bayou.

Q. To your knowledge, has there ever been any agreement or arrangement of any sort whereby Louisiana Fur, Humble, the Vermilion Corporation, and/or Exxon, on the one hand, and the U.S. or State governments on the other, whereby all or any part of the canal system was deemed to be private, and subject to private control by any of those four (4) corporations, or their privies?

A. With what other party?

Q. In other words, any agreement or arrangement between the private corporations involved, the Vermilion Corporation, Louisiana Fur, Humble, and Exxon, with either the Federal or State government, or both, on the other hand, to the effect that this canal system was and was to remain the subject of private dominion and control, private dominion and control meaning a private dominion,

and subject to the control of the four (4) private corporations, or any one of them.

A. Yes. If you read the servitude, I think that's certainly implied, not explicit, in the servitude agreement, relative to the donation of the grant, the donation for the servitude for the Freshwater Bayou Canal. And, certainly, the State Department of Public Works has never attempted to assert otherwise, or the Corps of Engineers, or any other Federal or State agency. They've always sought permission before entering upon the property and have followed the usual courtesies, I'm happy to say that, and have sought permission before entering on the property or any of the waterways, except for wildlife enforcement, of course, which is different.

Q. But the only agreement or arrangement or understanding to that effect, to your knowledge, would be embodied in the easement agreement which you mentioned, which again was in connection with the development of the Freshwater Bayou from Intracoastal to the gulf.

A. Well, that wouldn't be the only one, Mr. Hill. We've made many donations. I don't know of any other concern that has made donations to the extent that the group you speak of has made to the development of the area for the general public welfare. But in addition to the grant of servitude for the Freshwater Bayou Canal, a grant of servitude was made for the construction of highway to Pecan Island. Also, for the construction of the Intracoastal Canal. I think in each instance you'll find the instruments clearly set forth the privacy of the canals, not a part of the project servitude. And more recently, another grant of servitude for donation of a road to Freshwater Bayou Locks from Pecan Island. All these servitudes have been by donation.

Q. The land for the development of the Intracoastal Canal through this area was donated by Humble or Louisiana Furs?

A. Louisiana Furs. That would date back to Louisiana Furs.

Q. Do I understand correctly that the Vermilion Corporation as lessee claims to own the shrimp and other fishes in this canal system?

A. We claim to have the fishing rights in the canal system, Mr. Hill.

Q. I see. Where does Mr. Hebert live in Lafayette?

A. He lives at 100 Canterbury Street.

Q. Okay. The depth and width from Broussard's Landing to the point at which that north/south portion of the canal forks east and west, that depth and width is approximately what, sir?

A. Well, initially, those were sixty by eight foot canals. Now, they have been maintained by Exxon, formerly Humble, over the years, to where I couldn't give you an exact depth and width.

Q. They were originally sixty feet wide by eight feet deep?

A. Sixty by eight was the standard oilfield location canal.

Q. All right. So that most of this canal system when originally developed, was developed generally to those specifications?

A. Generally to those specifications.

Q. And, of course, Freshwater Bayou or the Freshwater Canal is larger and the Dewitt was smaller, correct?

A. That's correct.

Q. The nature of the water throughout the canal system is what, sir?

A. Well, it varies from brackish to salty to fresh, depending upon the season of the year, except—now, that

would be in the canals now. It's not the condition of the marsh.

Q. I understand.

A. Because we exercise water management over much of this marsh.

Q. Of course, I'm referring just to the canal system itself.

A. The canal system, it would alternate from brackish to salt to saline, and on to fresher waters, depending upon the season of the year.

Q. In the canal system itself are found what sort of fishes and other aquatic animals?

A. In the canal system, depending there again upon the season of the year—in the fall you have the channel bass or red fish. You also have the speckled trout to come in fall and summer months. They follow the shrimp migration. In addition, you have the garfish. And that's the predominant fish species in the canal, the gar, the speckled trout, and some drum and channel bass, red fish.

Q. Flounder here and there?

A. A few flounder.

Q. All of those species, except the ubiquitous gar are predominantly salt water species, are they not?

A. They would be salt water species. Now, in seasons of the year, you also catch, I might add, the fresh water game fish——you catch the crappie or sac-a-lait, you catch the bass, large mouth black bass, and you catch perch, goggle eye and bream.

Q. How long ago were no trespassing in private canal signs——and signs to that effect placed on and about the canal system itself?

A. How long ago?

Q. Yes.

A. Oh, since the——to my knowledge, the canals have been posted since the '20s, 1920s.

Q. When were citations first given by people in the employ of any of the four (4) corporations I have mentioned?

A. I'd say, continuously since 1926.

Q. Is this the first litigation of this type that any of the four (4) corporations have brought to restrain use of the canals by——(Interrupted)

A. No. There was previous litigation, injunctive——seeking injunctive relief.

Q. One or more others, do you know?

A. There were a number. You mean, in Vermilion Corporation, since the advent of Vermilion Corporation, or ——(Interrupted)

Q. Well, the Vermilion Corporation, Louisiana Fur, or either of the oil companies?

A. No. There was a number of injunctive suits brought over the years. I couldn't quote right now just how many.

Q. Were any of those ever appealed, to your knowledge?

A. I don't know. I couldn't answer that.

OFF THE RECORD.

NO FURTHER QUESTIONS BY MR. HILL.

THE WITNESS WAS TENDERED.

NO QUESTIONS BY MR. SONNIER.

NO QUESTIONS BY MR. ORTEGO.

THE WITNESS WAS EXCUSED.

DEPOSITION ENDED AT 3:45 O'CLOCK, P.M.

DEPOSITION CLOSED.

• • •

REPORTER'S NOTE:

The reporter was provided with the following information by Mr. Charles Sonnier relative to Exhibit "D—4".

"The servitude between Humble Oil and Refining Company and Vermilion Corporation to Vermilion Parish Police Jury for construction and maintenance of Freshwater Canal, Recorded in Book 494, Page 1, dated November 7, 1962.

Also, an auxiliary instrument between the same parties recorded in Book 610 at Page 330, dated April 7, 1967."

CERTIFICATE

STATE OF LOUISIANA

PARISH OF LAFAYETTE

I, Vernelle P. Hebert, General Reporter and Notary Public, duly commissioned and qualified in and for the Parish of Lafayette, Louisiana, do hereby certify that the witness,

JOHN DONOHUE,

by agreement of counsel, was sworn by me, that the foregoing thirty-four pages of typewritten matter constitute a true record of the testimony given by the said witness.

Further, I am not an employee of, or attorney for any of the parties, or otherwise interested in the outcome of this case.

Lafayette, Louisiana, May 14, 1977.

/s/ VERNELLE P. HEBERT

EXHIBITS ATTACHED TO MR. DONOHUE'S DEPOSITION

The Exhibits attached to Mr. Donohue's deposition, consisting primarily of large maps, cannot adequately be reproduced in this Appendix. They appear in the original record of the Vaughn case physically attached to the rear of Mr. Donohue's deposition.

AFFIDA IT IN OPPOSITION

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, Notary Public in and for the aforesaid Parish and State, this 28 day of May, 1977, personally came and appeared:

> NORMAN VAUGHN, FREDDIE BROUSSARD and LARRY J. BROUSSARD, all of the full age of majority and residents of the Parish of Vermilion, Louisiana,

who, on their oaths, declared:

As long as deponents can remember, the Humble Canal System has been used by fishermen, hunters, trappers, sportsmen, and generally anyone who wanted to use same. Broussard's and Hazel's Landings have been public landings and launch ramps on the Humble Canal System for years.

Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system in the area of Pecan Island, for example, Little Rollover Bayou and Freshwater Bayou, were actually used for purposes of transporting mail, transporting cattle, and transporting people, to and from Pecan Island on various kinds of small vessels. These natural waterways only ceased to be useable for these purposes after Humble developed its artificial waterway system.

AND FURTHER DEPONENTS SAITH NAUGHT.

/s/ NORMAN VAUGHN
Norman Vaughn

/s/ FREDDIE BROUSSARD
Freddie Broussard

/s/ LARRY J. BROUSSARD
Larry J. Broussard

15TH JUDICIAL DISTRICT COURT
NUMBER: 35,948
VERMILION PARISH, LOUISIANA

VERMILION CORPORATION
VERSES
NORMAN VAUGHN

15TH JUDICIAL DISTRICT COURT
NUMBER: 36,983
VERMILION PARISH, LOUISIANA

VERMILION CORPORATION
VERSES
LARRY L. BROUSSARD

15TH JUDICIAL DISTRICT COURT
NUMBER: 36,982
VERMILION PARISH, LOUISIANA

VERMILION CORPORATION
VERSES
FREDDIE BROUSSARD

JUDGMENT

The Motion For Summary Judgment filed herein by Vermilion Corporation came to be heard on May 31, 1977; those present were:

> John K. Hill, Attorney for Defendants
> Norman Vaughn, Larry L. Broussard and
> Freddie Broussard;
>
> Charles S. Sonnier and John E. Ortego,
> Attorneys for Plaintiff Vermilion Corporation.

After reviewing the pleadings, briefs, motions, affidavits, depositions, stipulations, and hearing the arguments of counsel, the Court considering that there is no genuine

issue as to material facts, and that Mover is entitled to a Judgment as a matter of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that there be Judgment herein in favor of the Plaintiff, Vermilion Corporation, and against the Defendants, Norman Vaughn, Larry L. Broussard and Freddie Broussard, permanently prohibiting, restraining and enjoining defendants from trespassing on any lands or canals located within the confines of the properties leased by Vermilion Corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of these proceedings are to be born by the defendants.

Judgment rendered in Lafayette, Louisiana, on the 7th day of June, 1977; read and signed in open court at Lafayette, Louisiana, on the 22 day of June, 1977.

/s/ ALLEN M. BABINEAUX
Judge

NO. 6258
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

VERMILION CORPORATION, *Plaintiff-Appellee*
VERSUS
NORMAN VAUGHN, *Defendant-Appellant*

Appeal from the 15th Judicial District Court, Parish of Vermilion, State of Louisiana; Hon. Allen M. Babineaux, District Judge, Presiding.

Before CULPEPPER, DOMENGEAUX, and WATSON, Judges

DOMENGEAUX, JUDGE

OPINION

This suit involves the right of the public to use man-made navigable canals on private property constructed and maintained with private funds.

Tris case was consolidated for trial and appeal with *Vermilion Corporation* v. *Freddie Broussard,* —— So.2d ——, No. 6259, (La. App. 3rd Cir. 1978), and *Vermilion Corporation* v. *Larry J. Broussard,* —— So.2d ——, No. 6260 (La. App. 3rd Cir. 1978).

The issues are the same in these three cases, and will be discussed herein, although separate opinions in each case are being rendered on this day.

Vermilion Corporation, plaintiff-appellee, leases 125,000 acres of land in Vermilion Parish owned by the Exxon Company. The land is traversed by a system of man-made canals. The canals are approximately 60 feet wide and 8 feet deep, are subject to tidal fluctuations, and are navigable in fact. They were constructed with private funds and have been under the continuous control, possession, and supervision of Vermilion Corporation, Exxon Company, and all prior owners since the 1900.

The canal system enters other naturally navigable waterways and lies between the Intracoastal Canal on the north, the Gulf of Mexico on the south, West Cheniere Au Tigre Canal on the east, and Rollover Bayou on the west. The canals are used to facilitate hunting, trapping, and fishing activities, and are also used by the Exxon Company for hydrocarbon exploration and development activities. Vermilion Corporation subleases portions of the land to hunters, trappers, and fishers. The right to use the canals is a part of the lease arrangement.

In order to control access to the land and the canals, over 400 "No Trespassing" signs are posted in various locations. In addition persons have been continuously employed to supervise activities in the canals and on the land. On numerous occasions Vermilion Corporation has prohibited persons from entering and using the property.

The present controversy arose when the defendants-appellants, Norman Vaughn, Freddie Broussard, and Larry J. Broussard, continued to enter the property and travel the canals in order to engage in commercial fishing and shrimping activities without obtaining plaintiff's permission. These individuals disregarded several written warnings issued by plaintiff. Consequently, these suits were filed seeking permanent injunctions enjoining the three defendants from trespassing on the property and in the canals and damages.[1]

After affidavits and a deposition were filed into the record, the corporation moved for summary judgments, which were granted by the trial court. Permanent injunctions against Vaughn and the Broussards were issued. They have perfected devolutive appeals.

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[1] No proof of damages was introduced in the District Court and no mention of damages is made on appeal. We, therefore, will not discuss the issue.

Defendants contend on appeal that the trial court erred in two respects:

1. In finding that there was no issue of material fact and, therefore, in granting the motions for summary judgment, and

2. In finding that the canal could be controlled by the plaintiff and, theerfore, in granting the permanent injunctions.

I. Summary Judgments

Article 966 of the La. Code of Civil Procedure provides:

> "The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.
>
> The motion for summary judgment shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the day of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."

In the present case the parties are in agreement on all relevant facts that are genuinely material to this case and upon which a judgment can be rendered. There is no question that the canals are navigable and were built and maintained with private funds on private property. It is not contested that defendants did engage in fishing and shrimping activities in the canals without permission.

Defendants contend, however, that there is a fact in dispute which is genuinely material to this litigation and that summary judgment was improper. They claim that plaintiff's system of artificial waterways destroyed the navigability of surrounding natural waterways. They argue that this is material because, if true, the court could conclude that the system of artificial waterways was substituted for the pre-existing natural system of navigablet waterways. If such a conclusion were reached, the canals would not be private and could not be privately controlled under state and federal law.

We do not agree. A similar argument was raised in *Ilhenny* v. *Broussard*, 172 La. 895, 135 So. 669 (1931), the facts of which are almost the same as in the present case. The plaintiff in that case, E. A. McIlhenny, constructed a private canal on his property. The defendant, Broussard, continued to use this canal without McIlhenny's permission McIlhenny sought to enjoin Broussard from using his private waterway. The contention was made that the waters from a natural canal were diverted by the man-made waterway and that therefore the man-made waterway was substituted for the natural waterway. The Louisiana Supreme Court rejected the argument stating that the diversion of water from a natural channel by a private man-made waterway does not give rise to a right of the public to use the man-made waterway.[2]

Defendants also contend that this litigation is too important to be disposed of by summary judgment. We fail to see the validity of this argument. Simply because there is no issue of material fact does not mean that the courts will not give a case full and complete treatment. Summary judgment merely avoids a full trial where the need does

[2] *See also, National Audubon Society* v. *White*, 302 So.2d 660 (La. App. • • •

not exist. The effect of a case on Louisiana law is not a valid reason for denying a party's right to summary judgment.

We therefore find no error on the part of the trial court in granting summary judgment in favor of plaintiff.

II. The Injunctions

Defendants contend that the injunctions should not have been granted as a matter of state and federal law. They argue that under La.R.S. 14:97 [3] and under 33 USCA Sec. 403 [4] (§ 10 of the Rivers and Harbors Act) a private individual may not exert dominion over a navigable waterway.

[3] § 97. Simple obstruction of a highway of commerce

Simple obstruction of a highway of commerce is the international or criminally negligent placing of anything or performance of any act on any railroad, navigable waterway, road, highway, thoroughfare or runway of an airport, which will render movement thereon more difficult.

Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both.

[4] § 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

With regard to state law, this court discussed the application of La.R.S. 14:97 to a private canal in *National Audubon Society* v. *White,* 302 So.2d 660 (La. App. 3rd Cir. 1974), writ denied 305 So.2d 542 (La. 1975), a case which defendants contend was erroneous and should be overruled.

The facts of *Audubon* mirror those in the present *copy illegible.* In that case a private canal was constructed in 1912 by *illegible* McIlhenny on his property in Vermilion Parish. The canal, *illegible* was the same canal involved in *Ilhenny* v. *Broussard, supra,* was navigable and connected with Vermilion Bay. In 1924 a portion of the land, including a part of the canal, was donated to the National Audubon Society. That organization used the property to operate the Paul J. Rainey Wildlife Sanctuary. The Audubon Society maintained their portion of the McIlhenny canal with its own funds. Access to the canal was restricted by the Audubon Society as it was restricted prior to the donation. The defendant in that case, Joseph White, used the canal without permission for fifty years to haul cattle, cotton, vegetables, and fruit to the market. In 1971 and 1972 he was notified by the Audubon Society that he could no longer use the canal. These notices were disregarded and suit for a permanent injunction to enjoin him from using the canal followed.

This court granted the injunction and held that a canal built entirely on private property with private funds for private purposes is a private thing. White contended that a landowner was prohibited from obstructing any navigable waterway, regardless of whether it was constructed with private funds, by virtue of La. R.S. 14:97, as applied by the Supreme Court in *Discon* v. *Saray, Inc.,* 262 La. 997, 265 So.2d 765 (1972), and the Fourth Circuit in *D'Albora* v. *Garcia,* 144 So.2o 911 (La. App. 4th Cir. 1962).

In *Discon,* landowners whose property bordered on a navigable canal dedicated for the use of the property owners, sought to enjoin another landowner from obstructing a portion of the canal. The Supreme Court concluded that plaintiffs were entitled to injunctive relief under La. R.S. 14:97. In *D'Albora* an injunction was sought to enjoin the owner of land from restricting passage on a navigable canal running through his property. The canal was dug by the State of Louisiana to obtain dirt for the construction of a highway. The Fourth Circuit affirmed the action of the trial court in granting the injunction on the basis of La. R.S. 14:97.

We distinguished *Discon* and *D'Albora* in *Audubon* on the basis that the canals in those cases were either built with public funds or involved a dedicated right of way. We held that La. R.S. 14:97 was inapplicable to a private canal which was not part of the public domain or was not dedicated to the public use, stating the following:

> "We distinguish the D'Albora and Discon cases from the instant suit, because in each of those cases the canal was either a part of the public domain or it had been dedicated for use by the owners of property in the subdivision in which the canal was located.
>
> We have concluded that LSA-R.S. 14:97 does not apply to a privately owned canal, even though it may be navigable. We agree with the views expressed by Professor A. N. Yiannopoulos, in discussing the case of Discon v. Saray, Inc., supra, where he stated:
>
> > 'The majority opinion necessarily rests on the assumption that the canal in question was burdened with a servitude of public use. *Indeed, it would be inconceivable to apply article 97 of the Criminal Code to a strictly private waterway.* The majority proceeded on the idea that this article was applicable because the canal was navigable, and, therefore, was burdened with a servitude of public use; in the alternative, that the canal was

burdned with a servitude of public use by virtue of dedication. *No one, however, should be prepared to accept the proposition that all navigable waterways in Louisiana are subject to public use merely by virtue of the fact they are navigable. A privately owned canal, though navigable in fact, may not be subject to public use, for the same reasons that a private road, though used by commercial traffic, may not be subject to public use. Thus, the disposition of the case would be correct only if the canal in question had been dedicated to public use.'* (Emphasis added)"

302 So.2d 660, 667-668.

We are convinced that the decision of *National Audubon Society* v. *White* was correct and apply it to this case. We hold that a canal on private property constructed and maintained with private funds and used for private purposes is a private canal subject to private control.

With regard to federal law, defendants have cited several federal cases[5] for the proposition that under 33 USCA Section 403, private individuals cannot control navigable waterways.

We have examined all of the federal cases and found them completely distinguishable from the present litigation. The cited cases involved situations where the United

[5] *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *United tSates* v. *Twin City Power Company*, 350 U.S. 222 (1956); *United States* v. *Willow River Power Company*, 324 U.S. 499 (1945); *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377 (1940); *United States* v. *Sexton Cove Estates, Inc.*, 389 F.Supp. 602 (S.D.Fla. 1975), affirmed in part, reversed in part, 526 F. 2d 1293 (5th Cir. 1976); *United States* v. *Cannon*, 363 F. Supp. 812 (D.Del. 1973); *United States* v. *Underwood*, 344 F. Supp. 486 (M.D.Fla. 1972); *United States* v. *412.715 Acres*, 53 F. Supp. 143 (N.D. Calif. 1943).

States was either seeking to expropriate private property or seeking to prevent the impairment of naturally navigable waterways.

In any event, we fail to see how 33 USCA Section 403 would forbid a landowner from prohibiting the general public from using his private canal. The statute grants authority to the Chief of Engineers and the Secretary of the Army to control waterways, but it does not grant individuals the unrestricted right to use a privately owned navigable canal. Our research has revealed the case of *United States* v. *Kaiser-Aetna*, 408 F. Supp. 42 (D.Ha. 1976), in which the United States attempted to use the same legislation to force Kaiser-Aetna to open a private marina in Hawaii to the public. The marina was originally a lagoon, Kuapa Pond, which was used as a fishing spot by the Hawaiian natives. The lagoon connected with Maunalua Bay, a navigable waterway. Under Hawaiian property law there was no question that the fish pond was private property. Kaiser-Aetna acquired interests in the pond and surrounding land. It developed a subdivision and transformed the fish pond into a marina. Use of the marina was restricted and all commercial vessels were excluded.

The federal court recognized the regulatory power of the federal government under its admiralty powers but it refused to find that the United States could appropriate the waterway to public use without reasonable compensation. The Court stated:

". . . [P]rivate 'fast' lands and waters when made navigable by improvements or which could be made navigable are subject to Congressional regulation. Nevertheless while Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway

without paying a reasonable compensation for the use thereof.

Here then, since Kaupa Pond has been transformed into navigable waters used in commerce, the marina has therefore become subject to regulation by Congress and within admiralty jurisdiction. It does not follow, however, that the United States can, without payment, appropriate those waters for *public* use and deprive the defendants of their investment or any return on it." [Footnote omitted]

408 F. Supp. 42, 54.

If the public has no right of use on a natural waterway made navigable by private funds under federal law, then *a fortiori* it has no right of use on an artificial navigable waterway constructed with private funds.

Thus, under state and federal law a canal on private property constructed and maintained with private funds for private purposes is a private canal, the use of which can be restricted by the landowner or his assigns. The injunctions in these cases in favor of the landowner's lessee was proper.

For the above reasons we affirm the judgment of the District Court. All costs are to be assessed against the defendant-appellant.

AFFIRMED.

Supreme Court, U. S.
FILED
SEP 2 1978
MICHAEL RODAK, JR., CLERK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD
AND LARRY J. BROUSSARD,

Petitioners,

VERSUS

VERMILION CORPORATION,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Brief on Behalf of Vermilion Corporation,
Opposing the Petition of Norman Vaughn,
Freddie Broussard and Larry J. Broussard

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**Brief on Behalf of Vermilion Corporation,
Opposing the Petition of Norman Vaughn,
Freddie Broussard and Larry J. Broussard**

Respondents, Vermilion Corporation, oppose the Petition for Writ of Certiorari to the Supreme Court of Louisiana filed herein by the Petitioners, for the following reasons:

I.

STATEMENT OF THE CASE AND MATERIAL FACTS

Respondent is the Lessee of and is in possession and control of certain lands in Vermilion Parish, Louisiana which is described in Exhibits which are part of the record of these proceedings. Exxon is the owner of the property in question, but Respondent is strictly a lessee and is not a "management arm" of Exxon as suggested by Petitioners on page 3 of their petition. There are numerous canals on the property, which are used as the primary means of transportation from one point to another within Respondent's leasehold, since the land is primarily marshland and water travel is the most suitable form of transportation within the leasehold. The canals are used for transportation purposes by sub-lessees and others with written permission from the Respondent. The canals in question were constructed by the present owner, and its ancestors in title, exclusively with private funds, and exclusively within the boundaries of their private property. Since the canals were built, they have been continuously supervised and controlled by Respondent, and by Respondent's lessor, and its ancestors in title.

The Petitioners have on repeated occasions, and after warnings from Respondent's warden, engaged in commercial fishing and/or shrimping activities on the canals within Respondent's lease, without the permission of Respondent. Respondent filed for an injunction and damages against the Petitioners, alleging that Petitioners had trespassed on the leasehold. Petitioners filed a petition for removal of those suits to the Federal District Court for the Western District of Louisiana. The removal was successfully opposed by Respondent, based on the fact that the petition did not state a Federal question, but was based solely on State law.

Petitioners then answered these lawsuits, pleading that the canals are navigable waters of the United States, and subject to use of the public, and in particular the Petitioners. Copies of the State Court pleadings were attached as Exhibits to the petition for writs. However they did not include the pleadings involved in the attempted removal. Respondent has attached these in the Appendix to this Brief as A-1.

Respondent filed a motion for summary judgment in the Trial Court, based on the ground that there was no material issue of fact presented or properly pleaded. All parties agreed that the canals were constructed solely on private property with private funds, and they have been possessed and controlled by Respondent its lessor and their ancestors in title. The fact that Petitioners used the canals without permission was not disputed, nor was it disputed that the canals are capable of certain types of navigation. However, contrary to the implications of Petitioners' arguments, Respondent has never made any admission of the legal status of the canals, as "navigable in law" or "navigable waters of the United States".

The trial judge granted the summary judgment, holding on State law grounds that the canals are private property of Respondent, and subject to private control. Petitioners appealed their case to the Court of Appeal, Third Circuit, State of Louisiana, and the decision of the Trial Court was affirmed. The application for Writ of Certiorari to the Louisiana Supreme Court filed by Petitioners was denied. Therefore the Louisiana Supreme Court did not rule on this case.

II.

ARGUMENT

A. OPPOSITION ON JURISDICTIONAL GROUNDS

This Court should not grant writs of certiorari, since the case below was decided and controlled by State law. The original petition filed by Respondent in the Trial Court was based on State law, as recognized by the Federal District Court when it remanded the case to State Court. The Trial Court's decision was obviously based on State law, citing the Louisiana Supreme Court case of ***Ilhenny v. Broussard,*** 172 La. 895, 135 So. 609, (1931) and the decision of the Louisiana Third Circuit Court of Appeal in ***National Audubon Society v. White,*** 302 So. 660, 1974, writ denied 305 So.2d 542 (1975). These cases determined the status of artificial canals built in the same area or locality as Respondent's canals.

The opinion of the Third Circuit Court of Appeal, attached as Exhibit A-3 of the petition, indicates that its decision was primarily based on State law. The Court in its opinion discussed the Louisiana cases on the subject matter and found on page A-11 "We therefore find no error on the part of the Trial Court in granting summary judgment in favor of the Plaintiff." and at page A-15 "We are convinced that the decision of ***National Audubon Society v. White*** was correct and apply it to this case. We hold that a canal on private property constructed and maintained with private funds and used for private purposes is a private canal subject to private control." Only after reaching the above conclusions, did the Third Circuit discuss the Federal law cited by Petitioners' brief, and distinguished the Federal cases cited from this litigation. No area of Federal law has yet attempted to preempt the issue of ownership and control of privately built and owned canals, not dedicated to public use,

and therefore the case was properly decided on adequate and independent State law grounds.

It is settled law that the Supreme Court will review a decision of the State Court only where it affirmatively appears from the record that a Federal question was presented to the highest State Court having jurisdiction and its decision on the Federal question was necessary to the determination of the cause, and where the decision may have been either on a State ground or on a Federal ground, and the State ground is sufficient to sustain a judgment, the Supreme Court will not undertake to review that judgment. ***Durley v. Mayo,*** Fla. (1956) 76 Sup. Ct. 806, 351 U.S. 277, 1 L.Ed. 2d 69.

In the case at hand, the highest court of Louisiana, the Louisiana Supreme Court, did not rule on this question, but simply denied the application for a writ of certiorari, which is discretionary within that court. The case of ***Stembridge v. State of Georgia,*** (1952) 72 Sup. Ct. 834, 343 U.S. 541, 96 L.Ed. 1130 held that where the highest Court of a State delivers no opinion, and it appears that the judgment might have rested upon a non-Federal ground, the United States Supreme Court will not take jurisdiction to review the judgment.

Several other cases stand for the proposition that if the judgment on the State Court was based on a decision of State law which was broad enough or adequate enough to support the State Court decision, the Supreme Court will not consider the Federal question, and will not grant writs, even though the Federal question was considered and determined by the Court below adversely to the plaintiff in error. See the case of ***Consolidated Turnpike v. Norfolk, Etc. Railroad Company,*** Va., (1913) 33 Sup. Ct. 605, 228 U.S. 596, 57 L.Ed. 982; ***Jankovich v. Indiana Tollroad Commission,*** Indiana, (1965) 85 Sup. Ct. 493, 379 U.S. 487, 13 L.Ed. 2d 439; ***Dixon v. Duffey,*** Cal. (1951) 72 Sup. Ct. 10, 342 U.S. 33, 96 L.Ed. 46;

Young v. Ragan, (1949) 69 Sup. Ct. 1073, 337 U.S. 235, 93 L.Ed. 1333; *McCoy v. Shaw*, Okl. (1928) 48 Sup. Ct. 519, 277 U.S. 302.

B. LOUISIANA STATE LAW CLEARLY HOLDS THAT RESPONDENTS ARE ENTITLED TO THE RELIEF GRANTED

The Louisiana appellate court in its opinion pointed out that the case at hand is similar to the one presented in *National Audubon Society v. White*, supra. The lands of the National Audubon Society are adjacent to those within Respondent's leasehold and its canals are in the same system and are almost identical to the ones involved in the case at hand. Likewise, the Rockefeller Wildlife Sanctuary, which is contiguous to Respondent's leasehold on the West, has the same system of canals. Their canals were constructed with private funds upon private property, and used for certain navigational purposes. The property was donated to the National Audubon Society for the establishment and operation of the Paul J. Rainey Wildlife Sanctuary. The National Audubon Society sued for and obtained an injunction preventing the defendant from using the canal. If the Court had ruled in favor of Petitioners, it would also open those sanctuaries to trespass and poaching to an unmanageable degree, because their canals connect with and are part of the same canal system as Respondents'.

The Court in *Audubon* found that a canal built entirely upon private property, and with private funds for private purposes, is a private thing, as in the case of a private road built on private property. Even though a canal is capable of sustaining some forms of transportation, it can still be privately owned if it is not dedicated to the public use or expropriated. The Court referred to LSA-C.C. (the Louisiana Civil Code) Articles 449, 450 and 453 which state that navigable rivers, highways, and the beds of rivers, are classifed as being "common" or "public"

things. The Court ruled that these classifications do not apply to canals constructed with private funds on private property, because it cannot be said that the ownership of the canal "belongs to nobody in particular" as provided in LSA-C.C. Art. 450, or that title to the canal became vested in a whole nation.

The Court based its opinion partially on a Louisiana case entitled *Ilhenny v. Broussard*, supra, a decision of the Louisiana Supreme Court involving the same canal. The Louisiana Supreme Court had actually decided the same issue many years before in the case of *Harvey v. Potter*, 19 La. Ann. 264 (1867). The Court stated in that case:

> "It is not easy to perceive how, in such a case, the public becomes seized of the right to the gratuitous use of advantages afforded by individual labor and enterprise. The right of expropriation, it is true, belongs to the public and the land and the canal so constructed upon it might, under Constitutional and legal provisions become public property and be appropriated to public use . . .
>
> "Private property shall not be taken for public uses, without ample renumeration first made to the owner. This is a fundamental principal. So it would seem clearly to follow that private property cannot be used by the public without compensation for that use. Perhaps Congress may have the power and jurisdiction over all navigable waterways, whether public or private, but the Fifth Amendment to the United States Constitution provides, and it is a fundamental law of our State and Nation that private property cannot be taken without just compensation."

Neither the State of Louisiana nor the Federal Government has chosen to exercise powers of expropriation over Respondent's canals, they have not been dedicated for public use, and therefore they are still subject to State law, which recognizes the ownership of Respondent.

C. RESPONSE TO PETITIONERS' ARGUMENTS ON QUESTION 1 OF ITS PETITION

Petitioners' first argument contends that if a private citizen develops a system of artificial navigable canals on his property, and in doing so destroys a pre-existing navigable waterway, then the public is entitled to a "navigation servitude" on the artificial waterway. Petitioners argue that this is the case we are dealing with, and thus they have the right to use Respondent's canals.

This Court should note from the onset that this defense was not plead by the Petitioners, as is necessary under Louisiana Procedural law. A review of the answers to these lawsuits, copies of which were attached to the Petition, will clearly show that these facts were not plead. LSA-C.C.P. Article 1005 states:

> "The answer shall set forth affirmatively arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, division, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, transaction or compromise, and any other matter constituting an affirmative defense . . ."

It is Respondent's contention that the argument raised in Question No. 1 of the Petition for Certiorari was not properly raised as an issue in State Court, and therefore is not before this Court.

Petitioners did sign an affidavit opposing Respondent's motion for summary judgment which made some reference to a pre-existing navigable canal. This affidavit, a copy of which was attached to the petition as Exhibit E, did not have the effect of bringing this properly as an issue in this lawsuit, since no affirmative defense was plead, nor were any facts set out in any pleading which raised this defense. Furthermore the affidavit did not meet the requirement of Louisiana law relating to these affidavits. Article 967 of the Louisiana Code of Civil Procedure states that:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matter stated therein . . . When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided above, must set forth ***specific facts*** showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be rendered against him." (Emphasis added.)

A review of the affidavit signed by the Petitioners reveals that the affidavit does not state ***specific facts*** within Petitioners' personal knowledge that raise material issues for trial. The affidavits state that petitioners were "aware" that there were two natural streams in the "area of Pecan Island" which ceased to be usable after the private canal system was developed. The facts were not alleged to be within the affiant's personal knowledge, nor did the affiants allege any facts which would relate the development of the private canal system with any previously existing natural waterways. Respondents suggest that no such facts were sworn to because affiants knew of none, nor do

any exist. Therefore, the Petitioners have not properly raised Question 1 of their petition for a writ of certiorari. Even if Question 1 were considered, Petitioners did not cite any authority for this proposition in their argument, nor did they cite such authority in their arguments to the State courts. Rather, the thrust of Petitioners' argument both under Questions 1 and 2 of their brief are directed at the proposition that there is no such thing as a privately owned navigable waterway, and this argument is treated below.

D. OPPOSITION TO PETITIONERS' ARGUMENTS UNDER QUESTION 2 OF THE PETITION FOR WRITS

Petitioners contend that it is impossible for a private citizen to own a navigable canal, and further contend that all navigable waters are burdened with a "navigation servitude" in favor of the public. Although this is stated as Question 2 of their petition, Petitioners made this argument in various parts of their petition. Respondent has shown above that the law of Louisiana is that a navigable canal can be owned by a private person, so the State courts were correct in their decision, and there is no reason for this Court to review a judgment based on adequate and sufficient State law.

Petitioners based their arguments in large part upon the case of *United States v. Kaiser-Aetna,* 408 Fed. Sup., 42 (1976). Respondent contends that the Petitioners have misinterpreted that case, and that a proper reading of that case reveals that it supports the contentions made by Respondent herein.

The *Kaiser* case was a suit by the U. S. Army Corps of Engineers for a declaratory judgment to determine whether or not the developers of a private marina in Hawaii had to secure a permit from the Corps of Engineers for future construction, excavation, and filling in of the marina. The suit was also for

an injunction to prevent the marina owners from interfering with public access to the waters of the marina. In that case, unlike the case at hand, the marina was a natural waterway, and was not created by artificial means. However it had been considered under State law as private property, even though it was connected to other navigable waters such as Maunalua Bay, which was a navigable waterway of the United States. The pond was developed in or around 1961 by private investors, and was dredged so as to increase its navigable capacity, in connection with private subdivision developments. The pond covered 523 acres, was navigable and subject to the tides.

The government contended that the pond was a navigable water of the United States for two reasons (1) that the pond was navigable in its natural state, and (2) that subsequently the pond became navigable by later developments, and thus became a navigable water of the United States subject to the "navigation servitude".

The Court first discussed whether or not the pond was navigable in its natural state, and those discussions are not really relevant to the proceedings at hand, since we are not dealing with a natural stream, but with an artificial waterway. The quotation on page 15 of the petition for writs discussing the "ebb and flow" theory and unique Hawaiian laws, was taken from the Court's discussion of whether or not Kuapa pond was navigable in its natural state and has no application to the case at hand. We are not dealing with the ownership or development of a natural stream. However the quotation which begins on page 13 of the petition for writs is relevant. Petitioners did not choose to include the entire quotation in their argument, but Respondent feels that it should be reviewed in its entirety and carefully studied.

The Court stated:

"The term 'navigability' has many legally distinct applications. (1) It may determine ***title*** to river and lake beds. (2) It has been the touchstone of Congressional ***jurisdiction*** over waters via the Commerce Clause. (3) It embodies the ***navigation servitude***, a modern declaration of the Common Law right of public access to the surface of waters. In addition, (4) admiralty jurisdiction in Federal Courts flows from the general concept of navigability. The use of the term 'navigability' for these four purposes, however, does not necessarily mean that each is co-extensive with the other. See ***United States v. Applician Electric Power Company***, 311 U.S. 377, 408, 61 Sup. Ct. 291, 85 L.Ed. 243 (1940). Therefore any reliance upon judicial precedent must be predicated upon careful appraisal of the ***purpose*** for which the concept of 'navigability' was invoked in a particular case. In this suit, plaintiff is seeking a determination that the Hawaii-Kai Marina is within Congressional jurisdiction as exercised and implemented by the Rivers and Harbors Act, and that the waters of the Marina are subject to the navigation servitude."

Therefore it is clear that the Court held that the term "navigability" can be used for different purposes, and simply because a body of water is navigable for one purpose, does not mean that it is navigable for other purposes.

After determining that the pond was not navigable in its natural state, and had always been considered under Hawaiian law as private property, the Court went on to determine the status of the pond after its development as a navigable waterway. The Court clearly recognized that it is very possible indeed for a navigable body of water to be privately owned. This case refutes Petitioners' contention that there is no such thing as a

"private navigable waterway". The ***Kaiser*** case clearly held that the pond was privately owned, even if it was navigable in fact, and even if it was subject to the jurisdiction of Congress within its power to regulate interstate commerce, and subject to regulation by the U. S. Army Corps of Engineers. The Court held that although the pond may have been navigable for purposes of Federal ***jurisdiction***, it was not a navigable water of the United States insofar as the "navigation servitude" was concerned. The two do not necessarily go hand in hand. The Court concluded the following:

"Federal admiralty jurisdiction has long been held to apply to artificial waterways that in fact form highways of commerce between States or into foreign commerce, over which vessels actually pass. Thus a ***privately owned waterway*** may come within the term 'navigable waters of the United States' as used in Section 10 of the Rivers and Harbors Act if it in fact supports interstate commerce. The Federal government has an intense interest in the quantity and safety of commercial traffic moving in interstate commerce, whether over natural or artificial channels, and possesses the Constitutional authority to regulate them." (Emphasis added.)

The court held that the waterway could be privately owned and controlled, even though it is a "navigable water of the United States" for the purposes of maritime jurisdiction or Congressional regulation.

"This determination that the waters of the marina are subject to Federal regulation, however, does not resolve the problems of this dispute.

B. Regulation v. Full Use of the Navigation Servitude

> As indicated above, the dominant Federal navigation servitude arises from the Common law ***public*** right to pass over ***naturally*** navigable waters. Because under Common law no private property right exists in such waters, therefore there is no private 'right' to be 'taken' by government action.
>
> Here, however, as stated above, there never existed any public rights in or to the waters of Kuapa pond, nor did its transformation into the present marina, by private funding, create, ipso facto, any ***public*** rights therein or thereto."

No doubt, the Petitioners misinterpreted the holding of that case when they argued that it stood for their proposition that navigable canals cannot be owned. The navigation servitude does not attach to all navigable waterways, and in particular does not attach to privately owned canals which have always been privately owned. If a ***natural*** waterway can be improved so that it becomes navigable, and still be considered private, then ***a fortiori*** an artificial navigable waterway can be built, on private property with private funds, without automatically imposing upon it a "navigation servitude".

The "navigation servitude" obviously only applies to public waters, and does not apply to privately owned rights. Louisiana has long considered a navigable canal built on private property with private funds as a private thing, as opposed to the Louisiana Civil Code definitions of "public things" or "common things". The ***Kaiser*** decision is very similar to the Louisiana jurisprudence relied upon by the State courts, as illustrated by the following excerpt from that case:

> "Nevertheless, while Congress may provide for the improvement and regulation of navigation, and take

> necessary action to prevent interference or obstruction to navigation, it cannot impose a ***public*** navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof."

That has long been the law in Louisiana, as ennunciated in ***Harvey v. Potter,*** supra, and other Louisiana cases which have been cited herein. The Court in ***Kaiser*** stated:

> "Here then since Kuapa Pond has been transformed into navigable waters used in commerce, the marina has therefore become subject to regulation by Congress and within admiralty jurisdiction. It does not follow, however, that the United States can, without payment, appropriate those waters for ***public*** use and deprive the defendants of their investment or any return on it.
>
> "If the government wants the marina open to free public use, the defendant must be paid. This the government has not done."

In summary, Respondent contends Petitioners' request for writs should be denied since this case was decided by the State Courts below on substantial questions of State law which were adequate to support the State Court's judgment. In addition, Respondent contends that the Petitioners never properly plead the issue which it argues, that previously existing navigable streams were interfered with by Respondent's artificial canals. Finally, Respondent takes the position that even though the decision below was made on State law grounds, that both State and Federal law on the subject clearly support the previous judgments made in this matter, and therefore there is no necessity for further review.

RESPECTFULLY SUBMITTED,

COOPER & SONNIER

BY: Charles R. Sonnier pwm.a.s.
CHARLES R. SONNIER

BY: John E. Ortego pwm.a.s.
JOHN E. ORTEGO
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121 East St. Victor Street
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief Opposing Petition for Writ of Certiorari and Attachments have been duly mailed to counsel for Petitioners, Mr. John K. Hill, Jr., P. O. Drawer Z, Lafayette, Louisiana 70502.

Abbeville, Louisiana, September 1st, 1978.

John E. Ortego pwm.a.s.
JOHN E. ORTEGO

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF VERMILION

BEFORE ME, the undersigned authority, Notary Public in and for the aforesaid Parish and State, this 25th day of August, 1978, personally came and appeared:

JOHN E. ORTEGO, to me personally known, who on his oath did depose and say:

That he is the attorney of record for Relators in the foregoing matter; that he has prepared the foregoing Brief Opposing Petition for Writ of Certiorari; that the allegations of fact contained therein are true and correct to the best of his knowledge, information and belief.

Appearer further declares that a copy of the above and foregoing Brief Opposing Petition for Writ of Certiorari has been duly mailed to counsel for petitioners, Mr. John K. Hill, Jr., by depositing a copy thereof in the United States Mail, properly addressed and postage prepaid on the 1st day of September, 1978.

/s/ John E. Ortego
JOHN E. ORTEGO

SWORN TO AND SUBSCRIBED BEFORE ME THIS 1st DAY OF SEPTEMBER, 1978, AT ABBEVILLE, LOUISIANA.

/s/ Paul J. Hebert
NOTARY PUBLIC

NOTARY SEAL

EXHIBIT A-1 (IN GLOBO)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

IN RE:

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15th JUDICIAL DISTRICT COURT

NUMBER: 35948

VERMILION PARISH, LA

PETITION FOR REMOVAL

TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE DIVISION:

Petitioner, NORMAN VAUGHN, a major domiciliary of Vermilion Parish, Louisiana, respectfully represents:

1.

Petitioner is the defendant in the above entitled Louisiana State Court action, which was filed and commenced in the 15th Judicial District Court of Vermilion Parish, Louisiana, on

November 7, 1975, and is now pending in that Court. Process - the petition of Vermilion Corporation and citation - was served on petitioner on the 17th day of November, 1975.

2.

The said State Court action is a civil action for injunction and damages against petitioner Vaughn wherein the plaintiff, Vermilion Corporation, asks that appearer be enjoined from allegedly "trespassing" upon a canal alleged by the Vermilion Corporation to be "private" in nature, but which canal is in fact and in law navigable, and further constitutes navigable waters of the United States.

3.

The Vermilion Corporation in said state court action further alleges that, in his use and navigation of said canal, petitioner has taken shrimp therefrom, and seeks to recover in damages for the taking of said shrimp.

4.

The claim of the Vermilion Corporation squarely falls within the admiralty and maritime jurisdiction of this Court under 28 U.S.C.A. 1333, as to both its prayers for injunction and damages, and further arises out of, is founded upon, or otherwise is governed exclusively by 33 U.S.C. 403, in that the Vermilion Corporation's suit for injunction, if taken arguendo as true and valid in its allegations, seeking to prevent an obstruction to the navigable capacity of the waters of the United States, or, and in truth and in fact, seeks itself to create an obstruction not affirmatively authorized by Congress to the navigable capacity of waters of the United States via seeking to enjoin a citizen of the United States from use of its navigable waters. Thus, the pending state court claim of the Vermilion

Corporation is also a civil action of which this Court has original jurisdiction founded upon a claim or right arising under the laws of the United States, and should be removed pursuant to 28 U.S.C. 1441(b).

5.

Appearer's alleged reducing of shrimp to possession from the alleged private canal in itself constitutes navigation thereof, and the claim for money damages for removal of said shrimp thus also constitutes an attempt to impose an obstruction to the navigable capacity of waters of the United States in violation of 33 U.S.C. 403. Alternatively, and should the Court feel that the claim for injunction is removable, but that the claim for damages would not be if sued upon alone, or vice-versa, then and in that event the entire state court case should be removed, pursuant to 28 U.S.C. 1441 (c).

6.

Copies of all process served upon appearer to date are attached hereto.

7.

Appearer files herewith a good and sufficient bond conditioned as the law directs, and will make payment of all costs and disbursements incurred by reason of this removal proceeding if this Court should determine that this action was not removable or was improperly removed thereto.

WHEREFORE, Appearer, NORMAN VAUGHN, prays that this cause be removed to this, the United States District Court, for the Lafayette Division of the Western District of Louisiana.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70501
COUNSEL FOR NORMAN VAUGHN

STATE OF LOUISIANA

PARISH OF LAFAYETTE

JOHN K. HILL, JR., Attorney at Law, in and for the Parish of Lafayette, Louisiana, being duly sworn by me, Notary Public, on his oath deposes and says that he is attorney for petitioner herein, Norman Vaughn, and that he has prepared the foregoing petition and that the contents thereof, and the matters and things mentioned therein are true and correct to the best of his knowledge, information and belief.

/s/ John K. Hill, Jr.
JOHN K. HILL, JR.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 3rd DAY OF DECEMBER, 1975.

/s/ Thelma Claire Bienvenu
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

VERMILION CORPORATION

VERSUS CIVIL ACTION NO.

NORMAN VAUGHN

MOTION TO REMAND

Now into court comes Vermilion Corporation, plaintiff in the above case removed to this court by the defendant, Norman Vaughn, who now moves to remand the suit to the 15th Judicial District Court, Parish of Vermilion, Louisiana, in which this matter was pending at the time of such removal, upon the following grounds:

1.

The plaintiff denies the allegations of the petition for removal that this court has original jurisdiction of this case under either 28 USCA 1331, federal question jurisdiction, or under 28 USCA 1333, admiralty and maritime jurisdiction.

2.

If this court finds that the claim of petitioner falls within the admiralty and maritime jurisdiction of this court under 28 USCA 1333, then plaintiff alleges that the matter is not removable to federal court by virtue of 28 USCA 1441B, which provides that any action which is not within the federal question jurisdiction of the court is removable only if none of the

parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

3.

In the petition for removal filed herein, it was admitted that the defendant, Norman Vaughn, is a domiciliary of Vermilion Parish, State of Louisiana. Therefore the suit may not be removed unless the petition is based upon a claim arising under the Constitution, laws, or treaties of the United States.

4.

Petitioner denies that its petition asserted a cause of action which arose under the Constitution, laws or treaties of the United States, but rather, the claim of Vermilion Corporation was based on the Louisiana trespass and tort laws. It is specifically denied that the original petition states a claim found upon 33 USC 403, as alleged by paragraphs 4 and 5 of the defendant's petition for removal. The original petition did not allege that the defendants created any obstruction to navigation.

5.

The cause herein was improperly removed in that it is properly within the jurisdiction of the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, and the matters asserted and the complaint filed in that court did not represent a claim or right arising under the Constitution, treaties or laws of the United States, nor is there diversity of citizenship.

6.

Plaintiffs herein further moves the court to order the payment to the plaintiff by the defendants of all costs and disbursements, including attorney's fees, incurred by reason of the removal proceedings.

WHEREFORE, the plaintiff prays that this case be remanded to the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, in accordance with the requirements of 28 USCA 1447 (c).

RESPECTFULLY SUBMITTED

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
Charles Sonnier
Attorney for Vermilion Corporation
Abbeville, LA 70510

* CERTIFICATE OF SERVICE *

I certify that I have served a copy of the foregoing pleading on all counsel of record herein by mailing a copy to said counsel this day.

Abbeville, La., 6 - 18, 19 76.

/s/ Charles R. Sonnier, Attorney
Cooper & Sonnier
121 East St. Victor
Abbeville, La. 70510

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

VERMILION CORPORATION

VERSUS CIVIL ACTION NO. CI-751289

NORMAN VAUGHN

FILED: February 23, 1977

JUDGMENT ON MOTION TO REMAND

IT IS ORDERED that the motion of the plaintiff, VERMILION CORPORATION, to remand this cause to the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, Docket No: 35,948, be, and the same is hereby sustained.

It is therefore, ordered that this cause be remanded to the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, as not properly removable to this Court.

Lafayette, La. this 23rd day of Feb., 1977

/s/ W. Eugene Davis
U. S. DISTRICT JUDGE

JUDGMENT READ AND RENDERED in Open Court on December 8, 1976, in Lafayette, Louisiana and signed in Lafayette, Louisiana, on this the _____ day of _____, 1977.

* CERTIFICATE OF SERVICE *

I certify that I have served a copy of the foregoing pleading on all counsel of record herein by mailing a copy to said counsel this day.

Abbeville, La., 2/16, 19 77.

/s/ John E. Ortego, Attorney
Cooper & Sonnier
121 East St. Victor
Abbeville, La. 70510

Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

No. 77-1819

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD, PETITIONERS

v.

VERMILION CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD, PETITIONERS

v.

VERMILION CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief responds to the Court's invitation of October 2, 1978.

JURISDICTION

The Supreme Court of Louisiana denied review of the court of appeal's judgment on March 27, 1978 (Pet. App. A-18). The petition for a writ of certiorari was filed on June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether an artificially constructed navigable waterway, built and maintained privately and situated on private land but connecting with navigable waterways of the United States, is a navigable waterway of the United States to which the public has a right of access by virtue of federal law.

2. When a privately constructed canal diverts and destroys a preexisting navigable waterway of the United States to which the public had access, whether federal law gives the public a right of access to the canal.[1]

STATEMENT

A final judgment has been entered against petitioners under the trespass laws of Louisiana enjoining them from entering on privately constructed canals located on respondent's private property (Pet. App. A-5). The Louisiana courts rejected as legally insufficient petitioners' allegations that the canals are navigable waters of the United States and that the canals had destroyed a preexisting natural navigable waterway by diverting those navigable waters into the canal system (Pet. App. A-2, A-10).

Respondent Vermilion Corporation is the lessee of a large tract of land in Vermilion Parish, Louisiana. On this land is a network of canals that connects with the navigable waterways of the Gulf Intercoastal

[1] We do not discuss the question whether petitioners may be prevented from fishing in respondent's canals.

Waterway on the north, the Gulf of Mexico on the south, the West Cheniere Au Tigre Canal on the east, and the Rollover Bayou on the west (Pet. App. A-8). The canals were built and have been maintained by respondent, its lessor, or their predecessors or agents (Pet. App. A-21). The canals are sixty feet wide and eight feet deep, are subject to tidal fluctuations, and are navigable in fact, being regularly used by a variety of vessels (Pet. App. A-8). Respondent brought these actions to enjoin petitioners from entering on the canals and from engaging in commercial fishing or shrimping in the canals (Pet. App. A-20, A-33).

In their answers, petitioners interposed the affirmative defenses that the canals are navigable waters of the United States and thus "burdened with a paramount easement of use in favor of the public," and that respondent's attempt to restrain petitioners' use of the canals constituted an obstruction of navigable waterways in violation of the Rivers and Harbors Act, 33 U.S.C. 401 *et seq.* (Pet. App. A-37-A-38, A-41, A-45).

The trial court granted summary judgment for respondent (Pet. App. A-2) over petitioners' objection that there were substantial issues of fact. Petitioners submitted an affidavit (Pet. App. A-109-A-110) asserting that, for as long as they could remember,

> the Humble Canal System has been used by fishermen, hunters, trappers, sportsmen, and generally anyone who wanted to use same. Broussard's and Hazel's Landings have been public

> landings and launch ramps on the Humble Canal System for years.

The affidavit also asserted:

> Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system in the area of Pecan Island, for example, Little Rollover Bayou and Freshwater Bayou, were actually used for the purpose of transporting mail, transporting cattle, and transporting people, to and from Pecan Island on various kinds of small vessels. These natural waterways only ceased to be useable for these purposes after Humble developed its artificial waterway system.

In granting respondent's motion for summary judgment, the Louisiana district court held that there was no right of public access to the canals because they were constructed with private funds on private property, were privately maintained, and their use had been restricted to persons given permission by respondent (Pet. App. A-2). The court rejected as a matter of law the claim that the diversion of navigable waters of the United States made the canals a public waterway (Pet. A-2). The Louisiana Court of Appeal, Third Circuit, affirmed on the same grounds (Pet. App. A-9-A-11). The Supreme Court of Louisiana denied review (Pet. App. A-18-A-19).

ARGUMENT

1. The authority of the federal government over the navigable waters of the United States permits Congress to protect and regulate the public's historic right of access to those waters. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 173-178 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 404-405 (1940). *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913); *Harman* v. *Chicago*, 147 U.S. 396, 407 (1893); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824).

Congress has protected the right of access to navigable waters by the terms of the various "organic acts" admitting new states to the Union. Thus, the Act admitting Louisiana to the United States, Act of April 8, 1812, ch. 50, 2 Stat. 701, provides that Louisiana's navigable waterways "shall be common highways, and for ever free" (2 Stat. 703):

> [I]t shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state as to inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state * * *.

This provision plainly recognizes a right of public access to natural waterways. *Hamilton* v. *Vicks-*

burg, S. & P. R.R., 119 U.S. 280, 284-285 (1886); see *Silver Springs Paradise Co.* v. *Ray*, 50 F.2d 356, 358 (5th Cir. 1931). But this Court has never decided, so far as we are aware, whether the right of access extends to artificial waterways privately constructed and maintained under circumstances such as those presented here. Nor has this Court squarely decided whether diversion of a natural waterway into an artificial one, thereby destroying the natural waterway, entitles the public to navigate the privately owned artificial channel even if the public would not otherwise have that right.

In *Huse* v. *Glover*, 119 U.S. 543, 548 (1886), the Court dealt with the latter question and virtually established a right of public access, subject to payment of reasonable tolls for the use of the improvement. The State of Illinois had constructed a series of locks and dams along the Illinois River for the purpose of improving navigation, but the improvements made navigation on the river impossible unless the canals were used. A steamboat company objected to payment of the tolls for use of the canals, relying on statutory language similar to that of the Louisiana Organic Act. In the course of holding that Congress could not have meant to forbid tolls designed to improve navigation, the Court explained—with specific reference to the Louisiana Organic Act—that Congress intended in such acts to "prevent any exclusive use of the navigable waters of the State—a possible farming out of the privilege of navigating

them to particular individuals, classes, or corporations * * *." *Id.* at 548. The object of the acts "was to preserve the rivers as highways equally open to all persons without preference to any, and * * * [to] prevent the use of the navigable streams by private parties to the exclusion of the public * * *." *Id.* at 547.

Although the precise question was not presented in *Huse* v. *Glover*, it seems clear that the Court would not have approved a state law in Illinois authorizing a private company to construct the canals and locks, thereby making passage in the natural channel impossible, and granting the company the exclusive use of the canals. Nor would the Court have permitted Illinois to accomplish the same result without a statute, by allowing the company to construct the canals and locks on the company's own land and then enabling the company to secure exclusive use of the canals through the State's common law of trespass.

Similarly, on the facts alleged in the present case, Louisiana may not allow a private corporation to create a canal system that destroys and replaces a natural waterway protected by the Louisiana Organic Act, and then let that corporation appropriate the exclusive use of the canals to itself and its lessees through the State's trespass laws. See *Dwinel* v. *Barnard*, 28 Me.554, 562 (1848).

However, these issues arising under the Louisiana Organic Act were not presented in the courts below, were not decided in those courts, and are not pre-

sented in the petition for certiorari, unless petitioner's references to the "navigation servitude" are deemed sufficient to present them. Thus, a serious question of this Court's jurisdiction and practice is presented. *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969); Sup. Ct. R. 23(1)(c). The United States expresses no view on that question.

2. Without relying on the Louisiana Organic Act, petitioners contend that all navigable waters of the United States are burdened with a "navigation servitude" that entitles the public to travel those waters. The fact that the water in respondent's canal system is navigable, they contend, entitles them to access.

It has, indeed, repeatedly been held that navigable waters and the private lands over which they flow are subject to a servitude which Congress has the power to protect. *E.g.*, *United States* v. *Rands*, 389 U.S. 121, 122-123 (1967); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703 (1899). Under this power, Congress in the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*) has forbidden any obstruction, modification, or improvement to the navigable waters of the United States without the government's prior approval. See, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 487-490 (1960). Because of this servitude, no compensation need be paid to the landowner for impairment of the water flow resulting from federal regulation of navigable waters. *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 69; *United States* v. *Chicago, M., St. P., & P. R. R.*, 312 U.S. 592, 595-597 (1941); *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945); *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225-228 (1956); *United States* v. *Rands*, *supra*, 389 U.S. at 122-123. The power applies not only to naturally navigable waterways, but to ones that have artificially been made navigable or that can be made so by a reasonable amount of improvements. *United States* v. *Appalachian Electric Power Co.*, *supra*, 311 U.S. at 407-408.

Respondent's canal system, its artificial nature notwithstanding, is therefore subject to the congressional power over navigable waterways. The Louisiana courts have found that respondent's canals are navigable in fact (Pet. App. A-8). They are subject to tidal fluctuations, and they carry vessels engaged in hydrocarbon exploration, fishing, hunting, and trapping (*ibid.*). Moreover, they connect with other canals and with the Gulf of Mexico (*ibid.*). They are navigable waters of the United States. See *United States* v. *Appalachian Electric Power Co.*, *supra*, 311 U.S. at 409; *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976).[2]

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[2] 33 C.F.R. 329.8, 42 Fed. Reg. 37162 (1977), provides in part:

> (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed

Under analogous circumstances, at least two courts of appeals have held that the public has a right to access to such navigable waters. *Silver Springs Paradise Co.* v. *Ray, supra*, 50 F.2d at 358; *United States* v. *Kaiser Aetna, et al.*, Nos. 76-1968 and 76-2400 (9th Cir. August 11, 1978), slip op. 10, petition for certiorari pending, No. 78-738. The Louisiana courts in this case, however, disagreed with that view.

Despite this possible conflict, we do not think the issue as presented here is of sufficient recurring im-

above; that is, whether the waterbody is capable of use for purposes of interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in facts supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turing area. (See 33 C.F.R. 329.12(b), 42 Fed. Reg. 37163.)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used for purposes of interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

See also 33 C.F.R. 322.2 and 322.5(g), 42 Fed. Reg. 37139 and 37141 (1977).

portance to warrant review by this Court now. In reaching this conclusion we have in mind especially that the various state organic acts would seem to preempt the issue, certainly with respect to naturally navigable waterways and possibly with respect to artificial ones as well.

3. A different question is presented by petitioners' claim that respondent's canal system destroyed and replaced a preexisting natural navigable waterway to which the public had access, a claim that must be accepted as true for present purposes since it was rejected as legally insufficient by the lower courts. As we have noted, petitioners failed to base this claim on a right of access to the preexisting waterway under the Louisiana Organic Act. But the question is presented (see Pet. 15; Pet. App. A-73) whether the obstruction of the preexisting waterway violated the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, and, if so, whether petitioners are entitled to the remedy they seek of a right of public access to respondent's canal system.[3]

Under the Rivers and Harbors Act, no obstruction, modification, or improvement to the navigable waters of the United States may be made without the prior

[3] The issues under the Rivers and Harbors Act do not depend on identifying the authority under which petitioners and the public had a right of access to the preexisting waterway. Whether that authority was the organic act, the navigation servitude, the Rivers and Harbors Act, another federal law, state law, or English common law brought over to this country, the affidavit submitted below attests to a right of public access to the prior waterway, and the lower courts did not question petitioners' assertion that such access had existed.

approval of Congress or of the Secretary of the Army acting through the Corps of Engineers. 33 U.S.C. 403-406. If respondent's canal system diverted, destroyed, and replaced a preexisting navigable waterway (Pet. App. A-2, A-10, A-109), as was alleged and as we must assume, the canal system itself would constitute a forbidden "obstruction" within the meaning of 33 U.S.C. 403, since it reduced if not eliminated the navigable capacity of the preexisting waters. *Sanitary District* v. *United States*, 266 U.S. 405 (1925); *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 487-490.

It is an open question under Section 403, however, whether as a result of the obstruction petitioners would have an implied statutory right to use the canal system (subject, of course, to the normal "rules of the road" for inland navigation). The only sanctions expressly provided by the Act are criminal penalties and injunctive relief in suits brought by the government. 33 U.S.C. 403, 406. This Court has established, however, that those remedies are not exclusive. In *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201-203 (1967), the Act was held to entitle the government to sue a shipowner that refused to remove its sunken vessel from navigable waters for the cost to the government of removing the vessel.

Wyandotte reasoned that the meager criminal penalties under the Act were too small to be effective without implied rights of enforcement; that the government was a principal beneficiary of the Act, if not the principal beneficiary; and that the harm that had resulted was of the kind that Congress in-

tended to prevent, so that a civil action for damages was an implied remedy under the Act. This result was reached by reliance on cases implying private causes of action from criminal and civil prohibitions. The Court's reasoning suggests that private plaintiffs, insofar as they are also intended beneficiaries of the Act, should not be treated differently from a governmental plaintiff with respect to implied rights of action.

Some lower federal courts have, in fact, held that private parties may seek damages and injunctions as implied remedies for violations of the Act. *E.g.*, *James River and Kanawha Canal Parks, Inc.* v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, 638-640 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973); *Potomac River Ass'n., Inc* v. *Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 357 (D. Md. 1975); *Sierra Club* v. *Morton*, 400 F. Supp. 610, 622-624 (N.D. Cal. 1975); *cf. Cort* v. *Ash*, 422 U.S. 66, 78-80 (1975). *But see Morris* v. *Tennessee Valley Authority*, 345 F. Supp. 321 (D. Ala. 1972), and *Connecticut Action Now, Inc.* v. *Roberts Plating Company*, 457 F.2d 81 (2d Cir. 1972).

Rather than damages or a prohibitive injunction, petitioners seek an equitable remedy of access to the canal system that allegedly replaced and destroyed the preexisting waterway in violation of the Act. Although at least one state court has ordered precisely such a remedy for diversion of natural waterways in violation of state law, *Dwinel* v. *Barnard*, 28 Me. 554, 562 (1848), the issue is one of virtually first

impression under the Rivers and Harbors Act.[4] Arguably, such a remedy is warranted as a means of redressing the injury done to users of the preexisting natural waterways by the Act's violation and as a way of vindicating the Act's purpose in such circumstances, in view of this Court's admonitions that Congress contemplated effective remedies for violations of the Act.[5]

We do not address the merits of that issue, for we do not believe the issue is of sufficient recurring importance to warrant review in this case. Today, before any person can connect a private canal into an existing waterway, the Army Corps of Engineers must grant its approval. 33 C.F.R. 325.3(b), 42 Fed. Reg. 37152 (1977). One of the factors the Corps must consider is the impact of the modification on the navigability of the existing waterway. *Ibid.* In order to protect the public right to navigation, the Corps often conditions its approval on the stipulation "that no attempt * * * be made by the permittee to prevent the full and free use by the public of all

[4] The only previous decision of which we are aware is *Ilhenny* v. *Broussard*, 172 La. 895, 135 So. 669 (1931), which rejected the implied remedy on the ground that any violation of the Act could be remedied by the Secretary of War as appropriate, a holding the lower courts in the present case felt obliged to follow.

[5] "Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences." *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 486, 492. See also *Wyandotte Co.* v. *United States*, *supra*; *United States* v. *Arizona*, 295 U.S. 174 (1935).

navigable waters * * *." 33 C.F.R. Parts 322 and 325, 42 Fed. Reg. 37139, 37149, 37157 (1977). Thus, the present regulatory regime protects the public's interest with respect to diversions of natural waterways. To be sure, that regime evidently has not prevented the injury alleged to have been wrought, in violation of the Act, by the construction and the exclusive maintenance of respondent's canal system. The judgment of the Louisiana courts against petitioners in this case would not, however, prevent further litigation concerning the legal status of respondent's canal system by other parties, either private or governmental.[6] Such litigation could present the questions under the Louisiana Organic Act that have not been presented here, and would be subject to review in this Court on those questions as well as the ones that are presented here.

4. We must acknowledge some conflict in approach between the Louisiana courts in the present case and the Ninth Circuit in *United States* v. *Kaiser Aetna*, Nos. 76-1968 and 76-2400 (9th Cir. August 11, 1978), petition for writ of certiorari pending, No. 78-738. There, the United States sought a declaration on be-

[6] We are informed by the Corps of Engineers that no permit was ever issued to build the canal system in question. It was constructed in "the 1900's" (Pet. App. 8). But see 33 C.F.R. 322.4, 42 Fed. Reg. 37140 (1977) (grandfather clause). We are also informed that the Corps of Engineers is now investigating respondent's canal system to determine whether any administrative or legal action with respect to it is appropriate. If any action is brought by the Corps, it can be expected to develop a more complete record than the affidavit on which the claim in the present case rests (Pet. App. A-109 - A-110).

half of the Corps of Engineers that the Kuapa Pond in Hawaii was a navigable water of the United States subject to Corps jurisdiction and open to public navigation. Kuapa Pond was essentially a land-locked "fishpond" when acquired by Kaiser Aetna, along with surrounding land, for transformation into a residential development and a marina. To connect the fishpond to Maunalua Bay, Kaiser Aetna dredged a short channel across the narrow bar that had separated the two bodies of water. The court of appeals held that Kuapa Pond, as improved, was a navigable water of the United States, although it had been made navigable with private funds and was situated on private lands, and held that any future modifications to the pond/marina would require advance approval by the Corps under the Act.[7] The court also held that the pond was open to public navigation even though Kaiser Aetna desired to maintain it as a private boating area.

The Ninth Circuit reached the conclusion that the pond/marina must be open to the public by ~~concluding~~ reasoning that navigable waters are by definition open for public navigation. The court also considered that federal regulatory authority over navigable waters cannot be

[7] The courts are in agreement that once a private canal interconnects with navigable waters, the private canal may not be modified without prior approval of the Corps of Engineers. *E.g., United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *Dow Chemical Co., Inc.* v. *Dixie Carriers, Inc.*, 330 F. Supp. 1304 (S.D. Tex. 1971), 463 F.2d 120 (5th Cir.), cert. denied, 409 U.S. 1040 (1972).

separated from the public right of navigation. The Louisiana courts in the present case rejected these arguments, holding that neither the navigation servitude nor the Act grants to "individuals the unrestricted right to use a privately owned navigable canal" (Pet. App. A-16).

The difference in approaches by these courts does not, in our view, justify review. The present case reaches the issue of general public access to navigable waters by failing to consider the Louisiana Organic Act, which might well be dispositive. Moreover, the record with respect to the construction and history of the canal system consists of a single brief affidavit that offers more conclusions than facts; if an enforcement proceeding is brought by the Corps (see note 6, *supra*), a better record could be assembled. At the same time, the putatively conflicting decision of the Ninth Circuit is correct, and it arises in the different context of a federal enforcement proceeding.[8]

[8] We are sending petitioners in *Kaiser Aetna* v. *United States*, No. 78-738, a copy of this brief.

CONCLUSION

For the foregoing reasons, the United States submits that the petition for a writ of certiorari in the present case should be denied. Because of the similarity of the issues presented, the Court may wish to consider the present petition together with the pending petition for a writ of certiorari in *Kaiser Aetna*, No. 78-738. In the event that the Court grants certiorari in either case, it may wish to do so in both cases and consider them together, since they present related issues concerning access to navigable waterways.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, LARRY J. BROUSSARD AND FREDDIE BROUSSARD, *Petitioners,*

v.

VERMILION CORPORATION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF FOR THE PETITIONERS

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IN THE

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VERMILION CORPORATION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF FOR THE PETITIONERS

CITATION TO THE REPORTED OPINION BELOW

The only reported opinion in this case is that of the Louisiana Court of Appeal, Third Circuit, at 356 So. 2d 551, writ denied, 357 So.2d 558.

STATEMENT OF GROUNDS OF JURISDICTION

The Supreme Court of Louisiana denied Relators' Application for Writs of Review to the Court of Appeal, Third Circuit, State of Louisiana, on March 27, 1978. The Louisiana Supreme Court is the highest Court of that state, and its denial of Relators' application was and is a final judgment as contemplated by 28 U.S.C. 1257. Under Louisiana Law, no application for rehearing may be filed as to a denial of an application for writ of review to the Louisiana Supreme Court [See Rule IX, Section 6, "Rules of the Supreme Court of Louisiana," adopted August 31, 1974, effective Jan-

uary 1, 1974, Volume 8, West's Louisiana Statutes Annotated-Revised Statutes].

Jurisdiction of this Court to review that Louisiana Supreme Court decision is conferred by 28 U.S.C. 1257 [3], as Relators here claim rights and privileges under the Constitution and Laws of the United States, primarily Article 1, Section 8, Clause 3, of the Constitution, 33 U.S.C. 403 and the Louisiana Organic Act [2 Stat. 703].

INVOLVED PROVISIONS OF LAW

(1) Article 1, Section 8, Clause 3, Constitution of the United States:

> "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States. . . ."

(2) 33 U.S.C. 403, which reads, in part, as follows:

> "The creation of any obstructions not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited. . . ."

(3) The Louisiana Organic Act, 2 Stat. 703, which reads in part as follows:

> "It shall be taken as a condition upon which the said state is incorporated in the Union that the . . . navigable . . . waters leading . . . into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to inhabitants of other states. . . ."

QUESTIONS FOR REVIEW

1. Are navigable canals built on private property with private funds, and which join other interstate navigable waterways, "navigable waters of the United States"?

2. Does destruction or impairment of natural navigable waterways through the building of artificial navigable canals entitle citizens to navigate freely upon the resulting artificial waterways?

3. Does a "navigation servitude" embodying a right to public access necessarily arise upon a finding of status as "navigable waters of the United States"?

4. What relationships exist between the "navigation servitude," the right of access, and the Louisiana Organic and Rivers and Harbors Acts?

5. Does the Louisiana Organic Act apply to artificially created navigable waters so as to afford a right of access to citizens?

6. Does the Rivers and Harbors Act prohibit legal obstructions to navigable capacity in the form of state court injunctions prohibiting public use of navigable waterways?

7. Does the destruction of a natural navigable waterway via the building of an artificial navigable waterway constitute an "obstruction to navigable capacity" under the Rivers and Harbors Act, and, furthermore, afford to the citizen a private remedy of access under the Rivers and Harbors and Louisiana Organic Acts?

STATEMENT OF THE CASE

A. Claims, Defense and Proceedings

Vermilion Corporation, Lessee from Exxon Company, U.S.A., of a large portion of the Louisiana wetlands in Vermilion Parish near the Village of Pecan Island [including lands from the Gulf Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre Canal on the

East to Rollover Bayou on the West] brought suit in the 15th Judicial District Court for Vermilion Parish, Louisiana, against Relators, Vaughn, Broussard and Broussard, alleging that Relators had "trespassed" on the leasehold via their navigation on and shrimping in Respondent's artificial canal system. This canal system was built by Respondent's predecessors in title on the leasehold.

Relators answered those suits, pleading that these canals are "navigable waters of the United States," subject to a paramount right of use for and on behalf of the public. Relators furthermore alleged that respondent's mere act of filing suit against them for "trespass" constituted an attempt by the Vermilion Corporation to obstruct the "navigable capacity of the navigable waters of the United States," all in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States and of 33 U.S.C. 403.

The case thus presented in the Trial Court a clash between an alleged right of private dominion and control over waterways versus a claim by Relators as citizens and members of the public of a right to use those waterways. The Commerce Clause, "navigation servitude," public right of access, Rivers and Harbors Act and Louisiana Organic Act all bear upon the resolution of this conflict.

Vermilion Corporation filed a Motion for Summary Judgment in the State Trial Court. In reasons of June 7, 1977, the Honorable Trial Judge, Allen Babineaux, granted the Summary Judgment, holding that the canals on the leasehold are private, privately owned, and subject to private control.

On June 22, 1977, the same date upon which Judge Babineaux signed the formal judgment in favor of the Vermilion Corporation, Relators obtained an order of appeal, and their appeal to the Court of Appeal, Third Circuit, State of Louisiana, was timely perfected.

The case was briefed and argued in the Court of Appeal and on February 6, 1978, by Judge Jerome Domengeaux, that court rendered its decision affirming Judge Babineaux' granting of Respondent's Motion for Summary Judgment in all three cases.

Relators applied directly to the Louisiana Supreme Court for the issuance of writ of certiorari of review seeking reversal of the judgments of the Trial Court and of the Court of Appeal, Third Circuit. The Louisiana Supreme Court denied this application on March 27, 1978.

Timely Petition for Certiorari to this Court was filed on June 23, 1978, and granted on February 21, 1979.

B. Statement of Facts

The ancestors in title of the Vermilion Corporation at various times since 1940 built with private funds on their privately owned lands in Vermilion Parish, Louisiana, canals which generally are 60 feet in width by eight feet in depth.

The canal system formed thereby is entirely unitary in that no part of it is sealed or separate from any other part. Furthermore, these canals, from their beginnings on or near the South side of Pecan Island, Louisiana, flow southerly through the Louisiana marshlands a few miles into the Gulf of Mexico, and the canal system otherwise connects with Fresh Water

Bayou and the Gulf Intracoastal Waterway, which are clearly "navigable waters of the United States."

The parties agree that this entire artificial canal system, which is most often referred to by the residents of the area as the "Humble Canal," is subject to tidal fluctuation, and is navigable in fact. It has been regularly used for oil and gas exploration, commercial shrimping, fishing and recreation since its creation.

In the Trial Court, Vermilion Corporation, via its Motion for Summary Judgment, admitted the truth of almost all of the Relators' factual allegations, which supported their claim that the Humble Canal is navigable in law, is in interstate commerce, and thus is part of the "navigable waters of the United States," not subject to private dominion and control.

The only factual allegation made by Relators which Vermilion Corporation disputed in the Courts below was that, in building this artificial canal system, Respondent's ancestors in title had used, impaired, and finally destroyed the factual navigability of certain natural navigable waterways which formerly existed in the area on and across which the Humble Canal now flows.

Specifically, at all times in this litigation, Relators have alleged that the old Fresh Water Bayou,[1] on and prior to the time of the development of the artificial "Humble Canal," existed in a natural state, flowed from a point North of Pecan Island, southerly to the Gulf of Mexico, and was a natural and actual marine

[1] The same applies to "Little Rollover Bayou" on the west end of the canal system.

highway of commerce for the citizens of the Pecan Island area. Indeed, it was the contention of Relators in all Courts below that the old Fresh Water Bayou had been used prior to the development of the artificial "Humble Canal" to transport cattle, groceries, human beings and the United States Mail to and from the Pecan Island area.

Most important, Relators alleged and swore to in affidavits filed in opposition to the Motion for Summary Judgment in the Trial Court, that those natural navigable waterways [particularly Fresh Water Bayou] became unusable only when the Vermilion Corporation's ancestors in title built the artificial navigable waterways in the area.

In short, Relators claimed that natural navigable waterways, once used as such, were impaired and destroyed by the artificial creations of a private corporate developer, and it is this factual assertion which was and is in vehement dispute between the parties.

All Courts below held in effect that, even assuming all facts alleged by Relators to be true, Relators' claims of rights and privileges under the Constitution and laws of the United States are of no moment, as the State of Louisiana views privately developed canals on private lands to be private property, despite their navigability, despite their connection with other maritime highways of commerce, and despite their possibly having destroyed via their creation a pre-existing natural navigable waterway system. To Louisiana, a privately developed canal is a "private thing," and that is all that matters.

ARGUMENT

I.

The "Navigation Servitude"—From Whence It Came, And Where It Went

The Commerce Clause, "navigable waters of the United States," and the public right of access to navigable waters do not embody identical or perhaps constantly and forever inseparable concepts. But as they relate to this litigation they are minutely different from each other.

The desire and need of Englishmen to travel and fish upon their waters gave birth to the "public common of piscary," which in turn produced the concept of "navigable waters." *United States* v. *Kaiser-Aetna,* 408 F.Supp. 42, 48-49, B.C., Hawaii, 1976, affirmed in part and reversed in part and remanded, 584 F.2d 378, 9th Cir., 1978.

The Commerce Clause [Art. 1, § 8, Clause 3 of the Constitution] gives the United States jurisdiction of the surface of navigable waters. *Martin* v. *Waddell's Lessee,* 41 U.S. 367, [1842], and *Harmon* v. *Chicago,* 147 U.S. 411 [1893].

The *Kaiser-Aetna* District Court describes the "navigation servitude" as a "modern declaration of the common law right of access to waters." *ibid.*

Thus, before the Commerce Clause, there was the "navigation servitude" and right of access, and the Constitution through the Commerce Clause transposed those concepts to an American and Federal context, and thus gave to Congress the power to enforce a right of the citizen which was thought to be worthy of preservation and enhancement.

Is the "navigation servitude" simply a vague right of the people and their government which requires specific Congressional action to implement at all, or is the idea of a "navigation servitude" as the patrimony of the citizen so capable of floating on its own bottom as to allow a citizen to make headway without the aid of the application of specific Federal statutory power?

The Government's amicus in response to Appearers' Petition for Certiorari described the public's right of access to waters as "historic," and the thinking of this Court since the early days of the Republic supports the proposition that the Commerce Clause exists, in part, to protect and foster a right to navigate. See *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 173-178 (1978); *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265 (1977); *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 69 (1913); *Harmon* v. *Chicago, supra; Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 193 (1824).

Is there now any reason left for timidity in viewing the "navigation servitude" as affording a self-executing right of access?

Justice Merrill for the 9th Circuit in *U.S.* v. *Kaiser-Aetna* thought not:

> "In the first place, in our judgment, Federal regulatory authority over navigable waters . . . and the right of public use cannot consistently be separated. It is the public right of navigation or use that renders regulatory control necessary in the public interest.
>
> "Secondly, the Federal navigational servitude and the public right of use are not imposed or appropriated by action of government in the nature of seizure. They exist as characteristics of all navigable waters of the United States."

U.S. v. *Kaiser-Aetna, supra,* Page 383

The public right of navigational use is not thus simply created or rendered potent by Congressional Act or Federal Regulations, but exists "by virtue of the waters' presence." *U.S.* v. *Kaiser-Aetna, supra,* Page 384.

But *Kaiser-Aetna* is not a lone revolutionary voice. *Silver Springs Paradise Co.* v. *Ray,* 50 F.2d 356, 5th Cir., 1931, *Swan Island Club* v. *White,* 114 F.Supp. 95, East. Dist., N. Car. 1953, Aff'd, 209 F.2d 698, 4th Cir., 1954 and this Court in the *Illinois Central* v. *State of Illinois,* 146 U.S. 387 (1892), gave to persons in controversies against parties other than the United States the right to navigate based on the common law as against opponents who claimed dominion of waterways through State grants of title. Thus, the right of access as an outgrowth of the navigation servitude has been thought to have some ability,to survive on ts own.

These private citizens feel that it is time and timely for this Court to hold that the right of access requires no specific executing authority. If maritime highways are "navigable waters of the United States" citizens should be deemed to be more than the possessors of a dormant or impotent right which requires specific Congressional and governmental aid to execute.

The power of the United States over navigable interstate waters under the Commerce Clause generally denies such a power to the states and to citizens—surely power as may be made manifest through state of private dominion and control over navigable waters. To say that that implication of the Commerce Clause should forever be viewed so conservatively as to deny to citizens the right freely to use that which the United States is charged specifically with the obligation to

preserve and protect in the interest of the citizen is to allow the heavy and dead weight of precedent to overcome that which is needed, fair, and legally wholly sound.

The Courts below should thus have held that no private citizen may procure an injunction to prohibit free navigational use of navigable waters by other citizens, and those Courts should have grounded their decision squarely upon the Commerce Clause, the navigation servitude that it embodies and protects, and the public right of access which emanates from the navigation servitude.

II.

Why The Rivers And Harbors And Louisiana Organic Acts?

There may be many answers to that question, but Appearers are interested in only one.

Congress generally has the power to protect the navigation servitude [See *U.S.* v. *Rands,* 389 U.S. 121 (1967), and *U.S.* v. *Rio Grande Irrigation Co.,* 174 U.S. 690 (1889)], and to protect public right of access to navigable waters [See *Ray* v. *Atlantic Richfield Co., supra.*]

It has been held that the Rivers and Harbors Act [33 U.S.C. 401 et seq.] was enacted to protect the navigation servitude. *U.S.* v. *Republic Steel Corp.,* 362 U.S. 482 (1960).

Furthermore, the Louisiana Organic Act [2 Stat. 703], by its specific terms demonstrates recognition of a right of public access, and in absolutely clear terms establishes statutory right of use. See *Hamilton* v. *Vicksburg,* 119 U.S. 280 (1886) and *Silver Springs Paradise Co.* v. *Ray, supra.*

The Rivers and Harbors and Organic Acts thus in an important sense created nothing new. They merely gave the long-established right of the people an emphasis, and new names by which to be known. Although the right of access and navigation servitude need no statutory implementing authority in Appearers' view, these acts nevertheless performed exactly that function.

III.

Navigable Waters Created On Private Lands With Private Funds May Be "Navigable Waters Of The United States" And Burdened With The Navigation Servitude

The parties entirely agree that the Humble Canal System is navigable in fact, and that it connects with various clearly interstate marine highways of commerce and with the Gulf of Mexico.

Vermilion Corporation's canals generally are 60 feet wide by eight feet deep, are subject to tidal fluctuations, and support much oil and gas exploration, commercial fishing and shrimping, and recreation.

The parties also agree that this canal system, except to the extent that it may connect with and thereby in any way involve natural waterways, was and is entirely the creation of private parties, and was done with private funds on private lands.

The Louisiana Courts' view of this matter, as set forth in this case,[2] in *Audubon Society* v. *White,* 302 So.2d 660, La. App. 3rd Cir., 1974, and in *Ilhenny* v. *Broussard,* 172 La. 895, 135 So. 669 (1931), is that navigability in fact, relationship to interstate commerce, and, generally, all other indicators of status

[2] 356 So.2d 551.

as "navigable waters of the United States" are irrelevant if waterways are privately constructed by private parties on privately owned lands.

The courts of Louisiana appear to have been on the wrong side of this issue for an extended time. *United States* v. *Appalachian Electric Power Company,* 311 U.S. 377 [1940], *United States* v. *Sexton Cove Estates, Inc.,* 389 F.Supp. 602, S.D. Fla., 1975, affirmed 526 F.2d 1293 [5th Cir., 1976], and, finally, and, definitively, *U.S.* v. *Kaiser-Aetna, supra,* show that waterways artificially created and which flow over private land may nevertheless be, if they are like those here involved, "navigable waters of the United States," subject to the federal power to regulate and, according to some of the cases previously cited, subject to a right of access and use by the public.

That is as it should be. Louisiana's marshlands are full of hydrocarbon exploration and production canals; Hawaii, Florida, California and other states have their marine, subdivision and resort developments, and, available technological and engineering capabilities, as well as the industrial, recreational and commercial needs of the United States will produce more and more "private" canals connected to navigable waterways. It requires little imagination to see the burden on interstate commerce [let alone the impairment or alteration of other navigable waterways to which these canals are connected] which "private" canals, if unregulated, will cause. There appears to be no good alternative to their being "navigable waters of the United States," and surely no good legal reason for their being otherwise.

IV.

Issues Under The Louisiana Organic Act Are Before The Court

The Louisiana courts were not called upon to determine, and did not determine, the validity of any statute, federal or state, as against constitutional or any other attack. Relators were simply sued by the "owners" of canals for an injunction to prohibit their "trespassing" via use of the canals, and Relators defended, *inter alia,* by saying that an injunction could not be issued to prevent citizens of the United States from using "navigable waters of the United States."

Louisiana's view is very simple, and it is certainly admirable that Judge Jerome Domengeaux of the Louisiana Court of Appeal, Third Circuit, was willing to state his Court's opinion so bluntly:

> "We hold that a canal on private property constructed and maintained with private funds and used for private purposes is a private canal subject to private control."

With regard to "federal law," Judge Domengeaux said:

> "If the public has no right of use on a natural waterway made navigable by private funds under federal law, then *a fortiori* it has no right of use on an artificial navigable waterway constructed with private funds.
>
> "Thus, under state and federal law a canal on private property constructed and maintained with private funds for private purposes is a private canal, the use of which can be restricted by the landowner or his assigns."
>
> *Vermilion Corporation* v. *Vaughn,* 356 So.2d 551, La. App. 3rd Cir., 1978, writ denied, 357 So.2d 558.

The Louisiana Organic Act, 2 Stat. 703, requires *ab initio* a finding of "navigability,"[3] and, as demonstrated in argument *supra,* the Organic Act as it relates to this case is little more than a recognition that the fact of navigability in interstate commerce produces the legal status of "navigable waters of the United States," which, in turn, gives rise to a right of access and use by the public.

The Louisiana Courts simply do not believe that this reasoning, whether based in the Constitution, in the common law or in the federal statutes, has any relationship whatsoever to "private" canals.

Thus, in the most basic way possible, the single most important threshold question which must be dealt with under the Commerce Clause, the common law and the Louisiana Organic Act as the same apply to waterways was addressed by the Louisiana Courts and was answered negatively and erroneously: "Navigability" simply makes no difference to Louisiana in this instance, despite the obvious and agreed fact that these and other hydrocarbon exploration and production canals all over the Louisiana wetlands are navigable in fact and are connected to the Gulf, various rivers, bayous and to the Intracoastal Waterway.

Although it is generally required that the federal question presented in this Court have been passed upon by the state courts below, such requirement is excused if the state courts have in fact considered the question. See *Beecher* v. *Alabama,* 389 U.S. 35 (1967). Here, they slammed the door on the most basic inquiry under the

---

[3] ". . . [T]he *navigable* . . . waters leading . . . into the Gulf of Mexico, shall be common highways, and forever free. . . ." 2 Stat. 703 (Emphasis supplied).

Organic Act of all, and thus closed all paths of examination thereunder.

Had the precise name and citation of the Louisiana Organic Act been raised below, the record which was made, and the ultimate questions which were asked, would have been no different from that which was done on both counts through all levels of the Louisiana Court System:

> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.
>
> * * * * *
>
> "Even though states are not free to avoid constitutional issues on inadequate state grounds . . . they should be given the first opportunity to consider them."
>
> *Cardinale* v. *State of Louisiana,* 394 U.S. 437, 439 (1969)

This record is not only totally "adequate," but is precisely the same record which would have been brought to this Court even if "Louisiana Organic Act" were stamped all over it. Furthermore, the State of Louisiana was given in this case not only a "first" opportunity, but, considering its jurisprudence, the most recent of many opportunities, to correct its error on the most important initial finding which must be made, and that is that a "navigable" body of water leading to the Gulf of Mexico cannot be a "private thing" simply because it was built on private lands with private funds.

In any event, no particular method of presenting federal issues is required by this Court:

> "Although no particular form of words is necessary to be used in order that the federal question

> may be said to be involved . . . there yet must be something in the case before the State Court which at least would call its attention to the federal question as one that was relied on by the party, and then, if the decision of the Court, while not noticing the question, was such that the judgment was by its necessary effect of denial of the right claimed or referred to, it would be sufficient."
>
> *Dewey* v. *Des Moines,* 173 U.S. 193, 199 (1899)

Finally, this Court has in several cases allowed argument which is closely related to the issues framed and dealt with in the state court. Particularly, one should see *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 1969. Also see *Boynton* v. *Commonwealth of Virginia,* 364 U.S. 454, and *Braniff* v. *Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954).

In summary, everything important about the Louisiana Organic Act was dealt with below, factually and legally, and the thoughts of the Louisiana Courts on the subject are clear: Private canals are private canals, and neither constitution, common law, nor statute pierce that fortress.

V.

The Louisiana Organic Act, And "Navigable" Waterways Privately And Artificially Created

The Louisiana Organic Act states:

> "It shall be taken as a condition upon which the said state is incorporated in the Union that the . . . navigable . . . waters leading . . . into the Gulf of Mexico, shall be common highways, and forever

free, as well to the inhabitants of the said state as to the inhabitants of other states. . . ."

2 Stat. 703

Sexton Cove Estates and *Kaiser Aetna, supra,* clearly indicate that waterways artificially created with private funds may nevertheless be, if navigable in fact and in interstate commerce, "navigable waters of the United States."

Is there any reason to assume or conclude that the Organic Act does not apply to waterways so created?

For reasons already discussed, if the Organic Act is merely a statutory recognition of the "navigation servitude" and of the right of access, and if the "navigation servitude" and/or the right of access apply to artificially and privately created waterways as well as to natural ones, the Organic Act should be deemed to apply to artificially and privately created navigable waterways as well.

Furthermore, this Court in *Huse* v. *Glover,* 119 U.S. 543, (1886) inferentially supported the idea that, under statutory schemes similar to the Louisiana Organic Act private parties may not, pursuant to state law authorization, (and *a fortiorari* without same) construct private canals, and thereby render a natural channel unusable, and yet retain exclusive use of the privately created canals.

Accordingly, appearers believe that the Organic Act applies precisely to this case and simply forbids, through the use of a state trespass law, the appropriation of exclusive use of privately created but never theless "navigable" canals.

VI.

The Rivers And Harbors Act

The Rivers and Harbors Act, 33 U.S.C. 402, et seq. prohibits any "obstruction to the navigable capacity" of the navigable waters of the United States. This Court, in *U.S.* v. *Republic Steel, supra,* has determined that the list of prohibited obstructions in the statute is illustrative, and that anything deemed to be an "obstruction" is thus forbidden.

There is, however, no law concerning whether or not the obstruction may be "legal" in nature as well as physical. Here, the claimed obstruction is an injunction issued by a State Court.

Appearers feel that an "obstruction" in injunctive form is as real as a dam, jetty or bridge: They cannot use these waterways as surely as they would not be able to if they were physically blocked or drained. According to the rationale of the Louisiana Courts, neither can any other citizen use those canals if Vermilion Corporation chooses not to allow them to do so, and presumably, the view of the Louisiana Courts is that Vermilion Corporation may refuse, politely or otherwise, the meddlings of the Corps of Engineers with this "private thing."

Huse v. *Glover, supra,* seems inferentially to be premised on the idea that a right of public access [based on a statute similar to the Louisiana Organic Act] in a factual situation generally similar to that at bar may not be impaired via allowing appropriation of exclusive use of a waterway by a private party. A corollary to that holding should be that that right of access may be

asserted as a defense to an action for trespass advanced by any person who pretends to have dominion over a navigable waterway.

Furthermore, there would seem to be ample authority for the proposition that, if one assumes Relators' factual allegations in the courts below to have been true, the destruction of a pre-existing natural navigable waterway system in a part of extreme Southern Louisiana via the building of an artificial system in its place is in itself a forbidden "obstruction" within the meaning of 33 U.S.C. 403, since it at least impaired, and in some cases probably eliminated, the navigable capacity of pre-existing waters. *Sanitary District* v. *U.S.*, 266 U.S. 405 (1925), and *U.S.* v. *Republic Steel, supra,* appear to support petitioner's conclusions in this regard.

However, and finally, does that necessarily mean that Appearers, as opposed to the Corps of Engineers, may assert a right of public access in defense of a suit brought against them for trespass? Does the Rivers and Harbors Act give this power to private citizens?

There is much authority for the proposition that private citizens may seek redress generally under the Rivers and Harbors Act. In *Wyandotte* v. *U.S.*, 389 U.S. 191 (1967), this Court afforded to the Government a right of action for damages as an implied remedy under the Act, and reached that decision via showing that numerous private causes of action have been heretofore held to arise by implication out of various criminal and civil laws. A corollary to *Wyandotte's* rule should thus be that private parties should be treated no differently than the Government as to the right to demand remedies under the Rivers and Harbors Act.

Even more clear are various lower court decisions on this general subject.[4] Under those decisions a private citizen may seek injunctive relief under the Rivers and Harbors Act. Is there any reason to distinguish between an equitable remedy of access, and an equitable remedy of injunction? One should remember in that regard that "access" was no problem until Vermilion Corporation sought to enjoin it.

To view this matter realistically, one should note that Appearers have claimed purely that they cannot be sued for trespass not so much because they have the right of access as because they feel Respondent has no right to exercise private control. Relators did not sue anyone for anything, but were and are simply defending against a claim brought against them which rests upon an allegation of private dominion of navigable waterways. These truly are not merely technical and semantic distinctions designed to circumnavigate the question of whether or not a private party under the Rivers and Harbors Act may claim an equitable remedy of access to a navigable canal system. Although certainly appearers feel that *Dwinel* v. *Bernard,* 28 Me. 554 (1848) provide an admirable and exact model for an appropriate result under the Rivers and Harbors Act [a private right of access], and although *Wyandotte, supra,* would seem to indicate the acceptance of an expansive view of the implied rights and powers of persons other than the government under the Rivers

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[4] *James River and Kanawha Canal Parks, Inc.* v. *Richmond Metropolitan Authority,* 359 F.Supp. 611, 638-640 (E.D. Ca.), aff'd, 481 F.2d 1280, (4th Cir., 1973); *Potomac River Ass'n., Inc.* v. *Lundeberg Maryland Seamanship School, Inc.,* 402 F.Supp. 344, 357 (D. Md. 1975); *Sierra Club* v. *Morton,* 400 F.Supp. 610, 622-624 (N.D. Cal. 1975); *cf. Cort* v. *Ash,* 422 U.S. 66, 78-80 (1975).

and Harbors Act, it is nevertheless true that Appearers' defenses in the State Court did not necessarily rest [although they should] on a finding of a correlative right of access in themselves. The only result necessary here was a finding, in effect, that Vermilion Corporation had no cause of action, or, in federal terminology, failed to state a claim upon which relief could be granted. But, again, to Louisiana none of these ramblings in and about the federal law make any difference: To the Louisiana Courts, the canals are "private," and that totally ends any further inquiry.

Messrs. Vaughn, Broussard and Broussard thus feel that this Court should conclude that, under the Rivers and Harbors Act, Vermilion Corporation had no right to "obstruct" via legal process the navigable capacity of the Humble Canal, and that Appearers were entitled to assert the Act in their own defense, and/or to claim a right of access thereunder.

VII.

The Organic Act Likened To The Rivers And Harbors Act

Just as the diversion or destruction of a natural navigable waterway by the creation of an artificial one in its place should be deemed to be an "obstruction" under the Rivers and Harbors Act, and just as a private party should be entitled to assert defenses which flow from Rivers and Harbors, Appearers should be able also to assert and prevail upon the proposition that the destruction of Fresh Water Bayou, et al by the artificial Humble Canal System, and the then appropriation of exclusive use or dominion of the artificial system by its creator, patently violated the Louisiana Organic Act.

Huse v. *Glover, supra, Wyandotte, supra,* and the lower court cases previously cited with regard to the rights of private parties emanating from the Rivers and Harbors Act, support this contention. Every reason and argument asserted to support the existence of rights in private persons under the Rivers and Harbors Act, and for deeming destruction of natural waters and appropriation of exclusive use of their artificial replacements to be a violation of Rivers and Harbors, should apply superabundantly to the Organic Act.

CONCLUSION

The Humble Canal System, though artificially created with private funds on privately owned land, meets all requirement of navigability, and joins the Gulf of Mexico as well as other navigable waters.

Louisiana thus should not have viewed these canals as "private things," because they are "navigable waters of the United States."

Louisiana never gave Appearers a chance. Summary Judgment was granted in the trial court, even though the agreed facts pointed exclusively to a status as "navigable waters of the United States." Furthermore, the one factual dispute—whether or not the artificial Humble Canal System had destroyed pre-existing natural navigable waterways—made absolutely no difference whatsoever to the Louisiana courts.

Yet, since these waters are "navigable" and are "navigable waters of the United States," under no circumstances was Vermilion Corporation entitled to their exclusive control, and no state court should have aided such a claim via the issuance of injunction. The Commerce Clause, the "navigation servitude," the pub-

lic right of access, the Rivers and Harbors Act, and, finally, the Louisiana Organic Act as the executor of the navigation servitude and right of access, should have prevented and precluded the Vermilion Corporation's claims, and the state courts' aid thereof.

The judgments below should be reversed and Vermilion Corporation's suit, dismissed. However, should the Court feel the agreed facts need further development, or that there needs to be a trial on the issue of whether or not the artificial canals destroyed the pre-existing navigable ones, there should be reversal and remand for trial, consistent with a declaration that the present Humble Canal System is "navigable water of the United States," and that Vermilion Corporation has no right to claim and enforce dominion thereof via injunction or otherwise.

Respectfully submitted,

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OCTOBER TERM, 1978

NO. 77 - 1819

NORMAN VAUGHN, FREDDIE BROUSSARD, AND LARRY J. BROUSSARD,
Petitioners,

v.

VERMILION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners,

V.

VERMILION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR RESPONDENT

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. 1257 (3), providing for assertion of rights and privileges under the Constitution and Laws of the United States.

As to issues raised in Petitioners' brief under the Louisiana Organic Act, 2 Stat. 701 et seq., the applicability of that Act was neither pleaded, argued, nor decided below. Therefore a serious question exists as to whether jurisdiction properly lies in this Court, for it is essential to the jurisdiction of the Supreme Court under 28 U.S.C. 1257 that a substantial federal question has been properly raised in the state court proceeding.

As to issues raised under the Rivers and Harbors Act, 33 U.S.C. 401 et seq., there is serious question of the existence of a private right of action on behalf of Petitioners to claim protection of that act in the absence of a determination by Congress or the Corps of Engineers that "navigable waters of the United States" are involved.

These jurisdictional issues will be discussed further in the argument below.

QUESTIONS PRESENTED

1. Whether this Court may consider Petitioners' claim to rights or privileges arising under the Louisiana Organic Act, 2 Stat. 701 et seq., when the applicability of that act was neither pleaded, argued, nor decided below?

2. Whether in the absence of action by Congress or its delegate, a private right of action exists on behalf of Petitioners under the Rivers and Harbors Act, 33 U.S.C. 401 et seq, to seek a judicial determination that a private artificially created waterway, built on private property with private funds, which adjoins "navigable waters of the United States" is itself, by nature of such joinder, a "navigable water of the United States" subject to the right of use by citizens of the United States and that a state court injunction preventing such use is an obstruction under the language of the Act?

3. Whether a private landowner who constructs privately owned artificial canals at private expense exclusively upon his private property subjects such canals to unlimited and uncompensated access by members of the public solely because such canals are navigable in fact and intersect in some places with "navigable waters of the United States."

STATEMENT

Petitioners' "Statement of the Case" (Petitioners' Brief pages 1-7), while reasonably accurate in generally setting forth the factual and procedural context of the questions presented for review by this Honorable Court, requires correction and supplementation in several important respects.

The canals herein at issue were not constructed as, and do not form, a highway of commerce. They were constructed on lands leased to Respondent by a private corporation for the purpose of providing access to trap lines and in connection with drilling operations or mineral exploration thereon and are continuously dredged to provide access to drilling locations.[1] They do not provide access to the Gulf of Mexico.[2] Use of these canals has at all times been predominantly by Respondent and by its mineral, trapping, hunting and grazing lessees.[3] No governmental agency has ever sought to regulate or otherwise exercise jurisdiction over the canals; on the contrary, all governmental agencies have at all times acknowledged Respondent's rights of ownership and control.[4]

Nothing in the record supports the implication contained in Petitioners' Affidavit in Opposition to Respondent's

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1. Affidavits of Murphy Sellers, App. p. 12a, and John Donohue, App. p. 15a. Deposition of John Donohue, App. pp. 21a, 26a, 28a ("This has been an evolving canal system"); 45a (". . .these canals were all developed as the most expeditious means and way to get to a drilling location").

2. Deposition of John Donohue, App. pp. 33a, 43a-44a.

3. Deposition of John Donohue, App. p. 42a.

4. Deposition of John Donohue, App. p. 48a ("They've always sought permission before entering upon the property and have followed the usual courtesies,. . .").

Motion for Summary Judgment that development of the canals herein at issue caused preexisting waterways to become unusable. Mr. Donohue's deposition is clear and unequivocal that impassability of the only natural waterways which formerly opened to the Gulf resulted exclusively from accretion of silt from the Atchafalaya River westward in the case of a small drainage coulee and from the rerouting of Freshwater Bayou and construction of a public waterway in the case of a larger stream.[5] There is, accordingly, no basis in the record for the suggestion that "natural navigable waterways, once used as such, were impaired and destroyed by the artificial creations of a private corporate developer".[6]

The alleged connection of Respondent's canal system with naturally navigable waters and alleged destruction of such waterways by construction of Respondent's canal system were not plead in Petitioners' Answer and were not at issue in the trial court.[7] Destruction of existing navigable waterways is only implied in Petitioners' Affidavit in Opposition to Respondent's Motion for Summary Judgment wherein it is asserted that "various portions of the natural navigable waterway system . . .only ceased to be useable for these purposes after Humble developed its artificial waterway system." [8]

SUMMARY OF ARGUMENT

The Writ of Certiorari was improvidently granted since this Court is without jurisdiction. The Louisiana Organic Act was

5. Deposition of John Donohue, App. p. 33a ("[development of the Dewitt Canal] would not have had any effect on that."). App. p. 35a.

6. Petitioners' brief, p. 7.

7. Answer, App. pp. 8a-10a.

8. Affidavit in Opposition, App. p. 54a.

not raised by the Petitioner in the state courts and is, therefore, not properly before this Court. Jurisdiction based on the Rivers and Harbors Act is improper both because no private right of action exists under the act and because neither Congress nor its designee – the Corps of Engineers – has determined that the waters involved are navigable and, therefore, within the scope of the act. In the absence of such a finding, the State of Louisiana is free to enforce its trespass laws with the assurance that the doctrines of comity and separation of powers will bar interference.

If this Court does have jurisdiction, the judgment of the state court should be affirmed. As the term "navigability" has evolved in the jurisprudence, it has no uniform meaning, but is variable depending on the context in which it is applied. As this court has recognized, it may be as broad as the full regulatory authority of Congress under the Commerce Clause. But this Court has also recognized that when applied to the federal navigation servitude, derived from English Common Law, it is much narrower. It is the federal navigation servitude that is at issue in this case and that servitude should not be enlarged under the guise of federal regulation.

The Commerce Clause and the Rivers and Harbors Act, passed under its authority, are both limited by the Fifth Amendment. Since the Rivers and Harbors Act in some cases allows a taking without compensation, it is important to ascertain the limits that the Fifth Amendment places on federal powers. Respondent submits that that limitation is found in the case law which defines "navigability" for the federal navigation servitude as including only waterways of natural existence. Broader terms of "navigability" apply only for the regulatory powers of Congress and Admiralty Jurisdiction.

Under both State and Federal law the term "navigable waters of the United States," for purposes of the federal navigation servitude, does not include canals constructed with private funds and on privately owned land. Petitioners concede in their brief that such is the holding of the Louisiana Supreme Court, but assert that the court is on the "wrong side of the issue. . . ." The fallicy of this assertion is demonstrated by Petitioners' reliance on cases involving the regulatory powers of Congress under the Commerce Clause to support their conclusion rather than cases delineating the navigation servitude. From its origin in English Common Law until present day, the courts have consistently held that the navigation servitude does not extend to private canals built on fast land with private funds. Thus, it is Petitioners, not the Supreme Court of Louisiana, who come out on the "wrong side of the issue . . . ."

The mere fact that the canals built on fast land are navigable-in-fact is not enough to make them navigable-in-law for the purposes of the navigation servitude. This Court in defining the term "navigability" in relation to the navigation servitude has consistently qualified the term with the words "natural or ordinary condition," thus making it inapplicable to artificially created canals. Furthermore, the navigable-in-fact, navigable-in-law rule requires that the waterway be part of an interstate highway of commerce. Respondent's canals do not serve such a purpose; the only useful purpose of the canal system is to provide access for Respondent to its leasehold. The ebb and flow of the tide test of navigability, sought to be used by Petitioners, was abandoned in this country in 1870 and has been rejected by the courts ever since.

Although Petitioners and the Solicitor General assert that they have always maintained in this litigation that prior to

the development of Respondent's canal system there existed a natural highway of commerce, such is not the case. Such an allegation was not pled as an affirmative defense in Petitioners' Answer as required under Louisiana law. Furthermore, the allegation is simply not supported by the record. Little Freshwater Bayou was silted up prior to the construction of Respondent's canals. Freshwater Bayou's navigability was destroyed when the Corps of Engineers re-routed it to build the Freshwater Bayou Canal, which was built by virtue of the gratuitous granting by Respondent of a public servitude over one of its canals. No governmental authority has ever been asserted over Respondent's canals and the Corps of Engineers has recognized the private nature of the canals.

Finally, important public policy reasons exist as to why the navigation servitude should not be extended to grant access to Respondent's canals. The delicate ecological balance of the area would be endangered by excessive influx of crafts upon the water. The reality of the situation is that Petitioners do not seek to use the canal for navigation purposes, but for their own commercial uses. Such access would prevent effective management and control of the ecological system. In addition, public access would be a disincentive to those who would build canals for oil and gas exploration so desparately needed at this time. In contrast, public access would serve no navigational purposes, but only the commercial interests of Petitioners.

ARGUMENT

I.

CERTIORARI WAS IMPROVIDENTLY GRANTED, THIS COURT IS WITHOUT JURISDICTION, AND THE WRIT SHOULD THEREFORE BE RECALLED.

A. Petitioners' Claim to Rights and Privileges Under the Louisiana Organic Act Was Not Properly Raised in the State Court Proceeding and Is Therefore Not Before This Court.

Certiorari in this Court was granted based on jurisdiction under 28 U.S.C. 1257(3). That statute reads in pertinent part:

> Section 1257. State Courts; appeal; certiorari.
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed as follows:
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of...the United States.

It is essential to the jurisdiction of the Supreme Court under Section 1257 that a substantial federal question has been properly raised in the state court proceedings. In *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969), this Court, in dismissing a writ of certiorari, made clear that "it was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." 394 U.S. at 438. Petitioners' claims to rights under the Louisiana Organic Act, 2 Stat. 701 et seq., were not presented in the state courts below, were not decided in those courts, and were not presented in the petition for certiorari.

The United States as *amicus curiae* on the petition for writ of certiorari recognized this problem and said: "A serious question of this Court's jurisdiction and practice is presented." [9]

Petitioners cite *Beecher v. Alabama*, 389 U.S. 35 (1967), for the proposition that the requirement of properly presenting the federal question is excused if the state courts have in fact considered the question. This proposition is inapplicable to the present case as the Louisiana courts did not in fact consider any issues under the Louisiana Organic Act. [10] The Louisiana courts were therefore not given the first opportunity to consider these issues. Petitioners' contention that the ruling of the Louisiana courts would have been the same if they had been properly presented with issues under the Louisiana Organic Act does not remedy this deficiency.

Since the applicability of the Louisiana Organic Act was neither pleaded, argued, nor decided below, that issue was not properly raised and this Court is without jurisdiction to decide those claims. "It is the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

B. A Private Right of Action Does Not Exist on Behalf of Petitioners Under The Rivers and Harbors Act in the Absence of Action by Congress or Its Delegate.

There is authority in the Second, Third and Fifth Circuits that has held there is no private right of action for a private party to bring suit under the Rivers and Harbors Act, 33

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9. Brief of the United States on the Petition for Writ of Certiorari at p. 8.

10. Appendix pp. 57a-66a.

U.S.C. 401 et seq.

This question was considered in *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F. Supp 412, (N.D. M.D., and S.D. Ala.), *aff'd., Sub Nom., Bass Anglers Sportsman Society v. Koppers Co.*, 447 F. 2d 1304 (5th Cir. 1971). In that case the private party plaintiffs were denied the right to enforce the Rivers and Harbors Act because the penalties for a violation of the Act were purely criminal. The court held that "criminal statutes can only be enforced by the proper authorities of the United States government and a private party has no right to enforce these sanctions." 324 F. Supp. at 415.

This rule was applied in *Morris v. Tennessee Valley Authority*, 345 F.Supp. 321, 324 (N.D. Ala. 1972):

> The Court only recently held that the Rivers and Harbors Act is a criminal statute enforceable only by the Department of Justice and creates no right of action in private individuals for damages or injunctions to enforce its provisions. *Guthrie v. Alabama By-Products Co.*, 328 F. Supp. 1140 (N.D. Ala. 1971), *aff'd.*, 456 F.2d 1294 (5th Cir. 1972).

The Court of Appeals for the Third Circuit has held that governmental enforcement is exclusive and that Congress did not create any civil cause of action in favor of private parties injured by any violation of the Act.

> Where Congress, in providing protectiion against private violations created no new remedy other than penal sanctions, we think it is illogical to imply that Congress intended that a violation by the State should give rise to a civil claim for damages.

> *Red Star Towing and Transportation Co. v. Department of Transportation*, 423 F.2d 104, 106 (3d Cir. 1970).

The Third Circuit rule was reaffirmed in *Loveladies Property Owners Association v. Rabb*, 430 F.Supp. 276 (D. N.J. 1975), *aff'd.*, 457 F.2d 1162 (3d Cir. 1976), *cert. cenied*, 432 U.S. 906 (1977), where the court held that the Rivers and Harbors Act did not create a private right of action. See also *Citizens Committee For Environmental Protection v. United States Coast Guard*, 456 F. Supp. 101 (D.N.J. 1978).

The Second Circuit also follows the view that the Rivers and Harbors Act does not create a private right of action. In *Hooper v. United States*, 331 F.Supp. 1056, (D. Conn.), an action against a power company, joined as a defendant with the United States, was dismissed since the "Rivers and Harbors Appropriation Act...does not create a new civil remedy and cannot be the basis for this court's jurisdiction." 331 F. Supp. at 1058. [11]

The power to prescribe laws governing the use or obstruction of navigable waters has been entrusted to Congress under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1(1824). Congress has delegated to subordinate administrative agencies, such as the Corps of Engineers, the power to determine what obstructions and improvements on which waters will be regulated under the federal power. In the present case neither Congress nor its delegate have made any determination that the waters in question are or are not navigable waters of the United States. In the absence of such

11. In the Ninth Circuit there is authority to the contrary. For example, in *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Ca. 1975) standing was granted to private party plaintiffs in a private cause of action under the Rivers and Harbors Act.

determination, the courts of Louisiana, seeking to enforce the property laws of that State, have enjoined Petitioners from trespassing upon Respondent's private property and private artificial canals built at private expense. Federal judicial interference at this stage would do violence to the two great policies which have heretofore dictated non-interference – the doctrines of comity and separation of powers.

Petitioners apparently recognize this for they seek to infer from the Rivers and Harbors Act that Congress has created a private right to pursue this action. Cases are cited in support of this proposition, but those cases are ones in which a private citizen obstructed naturally navigable waters, and Congress and the Corps of Engineers had already made a determination that such an obstruction would not be permitted. In the instant case, the waters are not natural waterways and there has been no determination that they will be treated as such. Since Congress has addrsssed this problem by granting criminal sanctions to be enforced by the Department of Justice, this Court should hold that a private right of action does not exist on behalf of these Petitioners under the Rivers and Harbors Act.

It is submitted that, for the foregoing reasons, the writ herein should be dismissed for want of jurisdiction. In the event that this Honorable Court does not find these arguments persuasive, in the alternative, it is submitted that the judgment below of the Court of Appeal for the Third Circuit of the State of Louisiana should be affirmed for the reasons set forth in the following sections of this brief.

II.

THE NAVIGATION SERVITUDE IS DISTINCT AND SEPARABLE FROM AND IS NARROWER THAN FEDERAL REGULATORY JURISDICTION.

A. Federal Power Over Navigable Waters Has Many Legally Distinct Sources and Applications.

The term "navigability" or "navigable waters" has many legally distinct sources and applications under both state and federal law. It is essential to a proper determination of the issue presented herein to recognize this and to understand that a particular body of water may be "navigable" for one purpose and not for another depending on the nature of the federal power being exercised.

> "Navigability" or "navigable waters" is the touchstone for determining many sovereign, private, and public rights in waters. A significant problem is the matter of defining "navigability". More precisely, the problem is that of clearly delineating navigability for a specific purpose at hand and distinguishing that test of navigability from other tests employed in varying contexts. Leighty, *Source and Scope of Public and Private Rights in Navigable Waters*, 5 Land and Water L. Rev. 391 (1970) at 397.

Navigability may be used to determine title controversies to the beds of lakes and streams, rights of riparian property owners, the fulfillment of treaty obligations, exercise of the war powers, the extent of admiralty jurisdiction, the validity of Congressional regulation under the Commerce clause, and the scope of public access under the navigation servitude.

There are other contexts in which the term is used but these represent the major applications. In each use the scope of federal power varies in degree.

Although concerned with the Admiralty and Commerce Clause application of "navigability", the primary concern in this case is the meaning and application of "navigability" for purposes of public access under the navigation servitude. Since the briefs of the Petitioners and of the Solicitor General as *amicus curiae* adequately review the common law history of the public right of access, Respondent feels it is unnecessary to do so again. It should suffice to say that we agree that the English concept of the "public common of piscary" was indeed carried over into an American and Federal context via the Commerce Clause of the Constitution.

What we do not agree with and what we do not believe Petitioners and the Solicitor General have adequately done is to delineate clearly the various applications and contexts in which the term "navigability" has been used in the multitude of cited cases. For this reason Respondent will attempt to present a conceptual framework in which the term "navigability" developed and is presently used in American water law.

In one of the very first cases in American Supreme Court history to consider the power of Congress vis-a-vis the states under the Commerce Clause, Chief Justice John Marshall declared: "All America understands the word 'commerce' to comprehend navigation. It was so understood . . when the Constitution was framed. The power over commerce including navigation, was one of the primary objects for which the people of America adopted their government." *Gibbons v. Ogden*, 22 U.S. (9 Wheat,) 1, 190 (1824). A half century later, after declaring the English ebb and flow of the tide test not to be "any test at all," Justice Field laid down the test

still valid today, for determining navigability.

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

This test of navigability was expanded in *The Montello*, 87 U.S. (20 Wall.) 430 (1874) where the Court stated:

> The true test of navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation . . .The capability of use by the public for the purpose of transportation and commerce affords the true criteria of the navigability of a river, rather than the extent and manner of that use . . . It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is navigable, but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade and agriculture. 87 U.S. (20 Wall.) at 441-442.

The federal test for determining navigability reached its modern day expansive meaning in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940):

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and Ordinary condition" refers to volume of water, the gradients, and the regularity of the flow. A waterway otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken . . . there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so. Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway suitable for traffic. 311 U.S. at 407-409.

The foregoing Supreme Court decisions enunciate an all encompassing test of navigability. However, before assessing their impact on the present controversy, one must realize that the preceding cases involved navigability as defined for Congressional regulatory power under the Commerce Clause while the question of public access under the navigation servitude was not at issue. This is but one of the distinct applications of the term "navigability" and has been used to

sustain action by Congress through its power to regulate commerce in a multitude of instances, ranging from prohibiting obstructions to navigable rivers to comprehensive flood control programs. *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690 (1899); *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1921); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Chicago, Milwaukee, St. Paul and Pacific Railway Co.*, 312 U.S. 592 (1941); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960); *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961).

The distinct applications of the term "navigability" become readily apparent through an examination of its use in delineating the scope of admiralty jurisdiction of the United States. In fact, this is the area in which navigability has been defined and applied in its broadest possible sense. The early case of *Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1951), extended admiralty jurisdiction beyond waters meeting the English ebb and flow of the tide test to all navigable waters. Justice Clifford, in *The Steamboat Belfast v. Boon*, 74 U.S. (7 Wall.) 624 (1869), stated:

> Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants. 74 U.S. (7 Wall.) at 640.

Navigability for the purposes of admiralty jurisdiction has since been extended by this Court to include even a wholly atrificial canal completely within the body of a state and subject to the state's ownership and control. *Ex Parte Boyer*, 109 U.S. 629 (1884). "Admiralty jurisdiction is not limited to transportation of goods and passengers in interstate or foreign commerce but depends on the jurisdiction conferred in Article 3, Section 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. This includes canals and other waters even if they be privately owned or claimed." *Mckie v. Diamond Marine Co.*, 204 F. 2d 132, (5th Cir. 1953); See also *Guinan v. Boston, Cape Cod and New York Canal Co.*; 1 F. 2d 239 (2nd Cir. 1924); *Silver Springs Paradise Co. v. Ray*, 50 F. 2d 356 (5th Cir. 1931); *The Lucky Lindy*, 76 F.2d 561 (5th Cir. 1935); *Southern Natural Gas Co. v. Gulf Oil Corp.*, 320 So. 2d 917 (La. 3rd Cir. 1975).

Other examples of the distinct and separable applications of the term "navigability" include: Title to beds of lakes and streams for federal purposes as in *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Holt State Bank*, 270 U.S. 49 (1926); and *United States v. Utah*, 283 U.S. 64 (1931); title to beds of lakes and streams for state purposes as in *Port of Seattle v. Oregon and Washington Railroad Co.*, 255 U.S. 56 (1921); and, riparian rights as in *Oklahoma v. Texas*, 258 U.S. 574 (1922); *United States v. Utah*, 283 U.S. 64 (1931); and *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977).

This Court explicitly recognized that the term "navigability" has legally distinct applications and meanings in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1941), when Justice Reed stated:

> Although navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly non-navigable. 311 U.S. at 408.

The Corps of Engineers, which has been delegated authority by Congress over navigable waters, also recognizes that the term "navigability" may have different applications and meanings. In the Corps' regulations defining "navigable waters of the United States," it is stated that "this regulation . . . is used to define authorities of the Corps of Engineers." 33 C.F.R. Section 329.1. These regulations also make clear that "precise definitions of navigable waters or navigability are ultimately dependent on judicial interpretation," but the Corps' definition "under this regulation are considered binding in regard to the activities of the Corps of Engineers." 33 C.F.R. Section 329.3

With the foregoing analysis in mind it becomes obvious that prior to reaching into the myriad of cases cited by Petitioners and the Solicitor General and pulling out a definition of navigability, it is essential first to clearly delineate for what purpose navigability will be used and then apply the proper scope of the term. The purpose behind the exercise of federal power under the Commerce Clause is of utmost importance and deserves careful analysis. In the present controversy, the only application of the term "navigability" that is before the Court is its application insofar as the federal navigation servitude is concerned.

B. The Navigation Servitude is More Limited in Purpose, Justification, and Scope Than Federal Regulatory Jurisdiction.

Although the federal navigation servitude and federal regulatory jurisdiction are both powers derived from the Commerce Clause and may have initially been coincidental in scope, only similarities exist now, as any rational limits of the navigation servitude have been far exceeded by federal regulatory power. The purpose of the navigation servitude is to preserve the nation's public waterways against private obstructions, while regulatory authority is as broad as the full power of Congress under the Commerce Clause.

The navigation servitude, carried over from English Common Law via the Commerce Clause, was preserved in the Northwest ordinance and in the various Organic Acts whereby states joined the Union. The Louisiana Organic Act, 2 Stat. 701, stated in part:

> *Provided,* that it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefore, imposed by the said state . . . 2 Stat. at 703.

This provision was characterized by Justice Field in *Hamilton v. Vicksburg, Shreveport and Pacific Railroad Co.*, 119 U.S. 280, 285 (1886) as ". . . having but one object;

namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation." See also *Huse v. Glover*, 119 U.S. 547, 548 (1886).

As this nation's commercial needs have grown, so has the definition of navigation as seen in the discussion above. The Rivers and Harbors Act, now codified at 33 U.S.C. 401 et seq., was first enacted in 1890 to prohibit unauthorized obstructions to the navigable capacity of national waters. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). Until recent times, the Act was usually applied to regulate structures obstructing navigation on naturally navigable-in-fact waterways. *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917). "As so applied, the scope of federal regulation was comparable to the scope of the navigation servitude. In recent times, however, the extent of regulation has been greatly expanded and now far surpasses the limits of the navigation servitude." [12]

The Rivers and Harbors Act with its origin in the Commerce Clause has provided the basis for expansive regulation by Congress and the U.S. Army Corps of Engineers. Seeds of regulatory expansion were sown in *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899) wherein this Court stated:

> It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything wherever done or however

12. *Kaiser Aetna v. United States of America,* Docket No. 78-738. Petitioners' Brief at p. 40.

> done, within *the limits of the jurisdiction of the United States which tends to destroy the navigable capacity* of one of the navigable waters of the United States, is within the terms of the prohibition. (emphasis ours).174 U.S. at 708. See also *United States v. Republic Steel Corp.*, 362 U.S. 482, 487-488 (1960).

The Rivers and Harbors Act is no longer merely a statute for protection of public navigation but has been extended to cover major pollution, environmental, and conservation problems. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

Congress has further extended federal regulatory power by virtue of the Commerce Clause in the various flood control acts. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960). And federal regulatory power has been extended still further in the Federal Water Pollution Control Act of 1972, 33 U.S.C. 1251 et seq., wherein navigable waters are defined to include "the waters of the United States." The Circuit Courts have interpreted this language to include discharges into non-navigable as well as navigable streams. *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). "Congress clearly meant to extend the Act's jurisdiction to the constitutional limit . . ." *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200 (1976).

> So unfettered is this control of Congress over navigable streams of the country that its judg-

> ment . . . is conclusive, *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) at 64.

Recalling that the only issue before this Court is the proper limit of the federal navigation servitude, Respondent believes that it is essential to recognize the distinction between the servitude and Congressional power to regulate under the Commerce Clause. For this reason the position of Petitioners and of the Solicitor General that the navigation servitude goes hand in hand with federal regulatory power over "navigable waters" cannot be sustained.

This Court has on more than one occasion recognized that the navigation servitude is more limited in scope than federal regulatory jurisdiction. This premise was first hinted at in 1903 when Justice Brown, speaking of *Ex Parte Boyer*, supra and admiralty jurisdiction, said:

> It has never been overruled or questioned, and must be treated as settling the jurisdiction of the admiralty court over the waters of any artificial canal which is the means of communication between ports and places in different states and territories. *It is not intended here to intimate that, if the waters, though navigable, are wholly territorial and used only for local traffic . . . they are to be considered as navigable waters of the United States.* (emphasis ours). *Perry v. Haines*, 191 U.S. 17, 28 (1903).

More recently, and referring specifically to the navigation servitude, this Court noted the distinction between it and federal regulatory jurisdiction and emphasized the more limited nature of the navigation servitude.

> It is not the broad constitutional power to regulate commerce, *but rather the servitude derived from that power and narrower in scope,* that frees the government from liability in these cases. When the government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. (emphasis ours). *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 808 (1950).

Though this case was dealing with the issue of just compensation, it illustrates one of the most important reasons why the navigation servitude cannot be equated with full federal regulatory power under the Commerce Clause. When the federal navigation servitude lawfully attaches to a navigable water, not only does it afford a public right of access to surface waters, but it is the servitude which lawfully permits the use, dredging, flooding, or taking of the bed up to the ordinary high water mark by the government, all without compensation to property owners. *Scranton v. Wheeler,* 179 U.S. 141 (1900); *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 312 U.S. 592 (1941); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); *United States v. Rands*, 389 U.S. 121 (1967).

The purpose of the navigation servitude was only to aid navigation. *United States v. Kansas City Life Insurance Co.*, supra; *United States v. Rands,* 389 U.S. 121, (1967). The servitude should not be enlarged beyond its purpose under the guise of federal regulatory power which has a different purpose.

> The plenary federal power over *commerce* must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 409 (1940).

When these distinctions are discerned, the irrelevance of much of the argument and citations of authority by Petitioners and the Solicitor General become obvious. They are concerned with navigability for purposes other than that at issue in this case. The only application and meaning of the term "navigability" presently at issue before this Court is its relation to the federal navigation servitude. With the purposes of the servitude in mind and the fact that it allows uncompensated takings, the navigation servitude can in no way be considered inseparable from federal regulatory jurisdiction under the broadest Commerce Clause application.

C. The Exercise of Federal Power Over Navigable Wat Is Limited by the Fifth Amendment to the U.S. Constitution.

The Fifth Amendment to the United States Constitution guarantees that "private property shall not be taken for public use without just compensation." This guarantee becomes relevant to Respondent when it is recognized that "confiscation may result from a taking of the use of the property without compensation quite as well as from taking of the title." *Chicago, Rock Island, and Pacific Railroad Co. v. United States,* 284 U.S. 80, 96 (1931). Although the navigation servitude is derived from federal power to regulate conferred by the Commerce Clause, in exercising those powers, Con-

gress must respect the private property guarantees of the Fifth Amendment.

> All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guarantees prescribed by it for the security of private property must be respected by all.
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> * * * *
>
> Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this Court has announced a rule that will embrace every case. *Scranton v. Wheeler,* 179 U.S. 141, 162, 153 (1900). See also *United States v. Cress,* 243 U.S. 316, 320 (1917); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893).

"Though the Congressional power over the regulation of commerce is far reaching, that power is limited by the due

process and taking clauses of the Fifth Amendment." *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3rd Cir. 1974). Since the navigation servitude finds its constitutional protection in the Commerce Clause, and since it is said that the Rivers and Harbors Act was enacted to protect the navigation servitude ,[13] it must be assumed that Congress intended to respect the limitations on power of the Fifth Amendment when the Rivers and Harbors Act was first enacted in 1890. Therefore, Petitioners' claim to protection under the Rivers and Harbors Act can only be sustained as to those waters subject to the navigation servitude as limited by the Fifth Amendment.

As has been previously mentioned, when the federal navigation servitude lawfully attaches to a navigable water, it not only affords a public right of access to surface waters, but also lawfully permits the use or taking of the bed up to the ordinary high water mark by the government without compensation to property owners. *Scranton v. Wheeler,* 179 U.S. 141 (1900); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States v. Rands,* 389 U.S. 121 (1967) and authorities cited therein. Since the application of the servitude may result in the loss of valuable private property rights, this Court early mandated that the limitations imposed by the Fifth Amendment must be observed. The navigation servitude should never be exercised in a Constitutional vacuum.

> The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give effect to that right, is so

13. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

> fully established and, and is so amply illustrated by recent decisions of this Court, that a mere reference to the cases will suffice (citations omitted), . . . But this rule, like every other, has its limits, and in the present cases, which require us to ascertain the dividing line between public and private right, it is important to inquire what are "navigable streams" within the meaning of the rule. *United States v. Cress*, 243 U.S. 316, 320-321 (1917). [14]

See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *United States v. Rands*, 389 U.S. 121 (1967). In *Monongahela Navigation Co. v. United States*, this Court said:

> Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. 148 U.S. at 336.

At this point it becomes relevant to review the Fifth Amendment limitations spoken of in these cases that are imposed on the exercise of the navigation servitude. Respondent submits this limitation is to be found in the waterways. natural existence. All of the authorities cited previously regarding the term "navigability" were concerned with rivers

14. This Court later limited its holding in *United States v. Cress to the facts there presented* in *United States v. C.M., St. P. and P. R. R. Co.*, 312 U.S. 592 (1941). That limitation was not directed to the Fifth Amendment limit on the exercise of the navigation servitude.

and streams wholly or in substantial part navigable in their natural condition, not waterways artifically created on private fast land. "Navigability" grew from those waters navigable-in-fact [15] to those waters capable of commerce [16] to those waters made navigable with reasonable improvements.[17] There is not a single decision of this or any other American or English Court holding that wholly artificial canals constructed on private fast land by private landowners at private expense automatically become "navigable waters of the United States" for the purpose of giving the public generally full and free access to those canals, and thus to the lands of the owners. And it can hardly be contended that constructing a canal through fast land is a "reasonable improvement" of an existing waterway.

The prior decisions dealing with artificial canals, as we have seen, hold only that such canals become "navigable waters of the United States" for the purpose of admiralty jurisdiction and Congressional regulation under the broad powers of the Commerce Clause. On the other hand the navigation servitude, "narrower in scope," allows uncompensated government taking because the owner has had "ample notice over the years that such property is subject to a dominant public interest." The owner's title to the property is therefore said to be "imperfect". *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 808 (1950).

Only fantasy would allow one to believe that the owner of fast land who has constructed a canal thereon at his own expense was on any kind of notice that his title was imperfect. While they may be subject to regulation, private property

15. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

16. *The Montello*, 87 U.S. (20 Wall.) 430 (1874).

17. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

rights cannot be taken without compensation. After recognizing that the navigation servitude is limited by the Fifth Amendment guarantees of due process and just compensation, this Court has stated:

> By an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. *United States v. Cress*, 243 U.S. 316, 321 (1917).

Though the test of navigability in fact has grown with the needs of commerce, the limits of the Fifth Amendment still exist. It is the task of this Court to determine the present extent of those limits in relation to the navigation servitude. Respondent urges this Honorable Court to agree that artificial canals constructed with private funds in fast land privately owned lie within the protection of the Fifth Amendment limitation.

III.

THE FEDERALLY PROTECTED RIGHT OF THE PUBLIC TO NAVIGATE OVER THE NAVIGABLE WATERS OF THE UNITED STATES HAS NO APPLICATION TO RESPONDENT'S WHOLLY ARTIFICIAL CANAL SYSTEM.

A. Respondent's Artificial Canals Constructed Entirely on Private Property at Pricate Expense Are Considered Private Under State and Federal Law.

For a proper determination of what is at issue in this case it must be emphasized that the question of whether Respondent's canals are "navigable waters of the United States" is not involved. Respondent concedes that for some applications of federal power some of the canals may be so considered. The only issue presented is whether Respondent's wholly artificial canals constructed on private fast land at private expense are subject to the federally protected right of the public to navigate over the "navigable waters of the United States." This case does not involve naturally navigable waterways or improvements, reasonable or otherwise, to any kind of preexisting river, bayou, stream or pond.

Louisiana law is clear on the status of Respondent's canals and makes it clear that these canals are private property subject to the control and use of the owner. The Louisiana Court of Appeal for the Third Circuit based its decision in the opinion below on longstanding statements of Louisiana law. In the early case of *Harvey v. Potter*, 19 La. Ann. 264 (1867), the Louisiana Supreme Court held that the public does not have a right of access to a canal constructed entirely on private lands exclusively at the owner's expense. In discussing the navigation servitude and the Fifth Amendment limitations on the servitude, the court stated:

> It is not easy to perceive how, in such a case, the public become seized of the right of gratuitous use of advantages afforded by individual labor and enterprise. The right of expropriation, it is true, belongs to the public, and the land and canal so constructed upon it, might, under constitutional and

> legal provisions, become public property, and be appropriated to public use. But where no public need exists for such conversion and the property in its entirety is subjected to private ownership, it would seem that the proprietor has the right in any manner he deems best, to render that property most productive, subject only to the rule "sic utere tuo ut alienum non laedas". . . . Private property shall not be taken for public uses, without ample renumeration to the owner. This is a fundamental principle. So it would seem clearly to follow that private property cannot be used by the public without compensation for that use. 19 La. Ann. at 264-265.

Louisiana courts have had other occasions in which to make clear their position on the private ownership of artificial canals constructed on private property. In *Ilhenny v. Broussard*, 172 La. 895, 135 So. 669 (1931) and in *National Audubon Society v. White*, 302 So. 2d 660 (1974), *writ denied*, 305 So. 2d 542 (1975), the Louisiana courts held that a private artificial canal constructed on private property was not subject to public use.

> We believe that a canal built entirely on private property, with private funds and for private purposes, is a private thing, for the same reasons that a road built on private property for private purposes is a privately owned road. 302 So. 2d at 665.

In reference to these decisions, Petitioners assert that "the courts of Louisiana appear to have been on the wrong side of this issue for an extended time." (Petitioners' Brief p. 13). This statement is made after incorrectly assuming that in

each of these cases the Louisiana court concluded that "navigability in fact, relationship to interstate commerce, and, generally, all other indicators of status as navigable waters of the United States are irrelevant if waterways are privately constructed by private parties on privately owned lands." (Petitioners' Brief pp. 12-13). In the cases cited by Petitioners the issue was not whether the waterways were "navigable waters of the United States" but only if a right of free public access attached to them. As already explained, the character of waterways as "navigable waters of the United States" depends upon the intended application of that term. This becomes readily apparent when one examines the authorities cited by Petitioners in support of the proposition that the Louisiana courts are on the wrong side of the issue. The cited cases dealt with federal power to regulate under the Commerce Clause and did not involve any application of the navigation servitude. The concepts are distinct and separable and the term "navigability" does not have the same application in each.[18]

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18. Petitioners cite *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940) and *United States v. Sexton Cove Estates, Inc.*389 F.Supp. 602 (S.D. Fla. 1975), *affirmed*, 526 F.2d 1293 (5th Cir. 1976). In *Appalachian* the United States sought to enjoin a power company from constructing a dam without a permit from the Federal Power Commission. In *Sexton Cove Estates* the issue was whether a property developer must seek permits from the Corps of Engineers before engaging in dredging operations that were proven to have an adverse affect on navigable waters. Both cases involved Commerce Clause regulatory power and neither involved the application of public access under the navigation servitude. Petitioners also cite *United States v. Kaiser-Aetna*, 584 F.2d 378 (9th Cir. 1978), *certiorari granted*, Docket No. 78-738. The Court of Appeals in *Kaiser-Aetna* "took a familiar concept , i.e., all public navigable waters are subject to federal regulation, and applied it in reverse, concluding that waters subject to federal regulation are public waters subject to the federal navigation servitude." (*Kaiser Aetna v. United States*, Docket No. 78-738, Brief of the Petitioners at p. 29 and accompanying notes). As correctly pointed out by counsel for Kaiser Aetna in that case, no opinion of the Supreme Court so holds and the Ninth Circuit failed to cite authority for the proposition. Cases cited dealt with the Federal Water Pollution Control Act.

Since the right of public access emanating from the federal navigation servitude has its origin in English law and the "public common of piscary," it becomes relevant to examine just what the English law was on the subject of artificial canals constructed on private property. The Solicitor General quotes from *De Jure Maris* by Sir Matthew Hale, Lord Chief Justice during the reign of Charles II, in support of his position but in doing so omits part of Lord Hale's statement in reference to artificially constructed waters. (See U.S. Brief at page 28-29). Respondent believes Lord Hale's complete comments are relevant.

> But if any person at his own charge makes his own private stream to be passable for boats or barges either by making of locks or cutts or drawing together other streams; and thereby that river, which was his own in point of propriety, became now capable of carriage of vessels, yet this seems not to make it juris publici, and he may put it down again or apply it to his own private use. Hale, *De Jure Maris*, Part I, Chap. 3.

The Solicitor General indicates that Lord Hale's opinion did not accurately represent English law and cites *Simpson v. Attorney-General* (1904) A.C. 476, and *Case v. The Midland Railway Company*, 27 Beavan 247 (1859), to support this proposition. However, both of these cases dealt with the construction of canals and improvement of waterways under either a Parliamentary Act or a King's Charter. In both cases the instrument allowing the creation of the waterway required that they be kept open to the public. Thus the cases are inapposite. In fact, *Simpson v. Attorney-General* supports the proposition that Lord Hale's opinion did accurately represent English common law. Those commenting on the law of England since that time agree.

> It cannot be implied from the fact that a person, at his own expense, has made his private stream navigable by making locks or cuts or drawing together other streams, that the public has any rights of navigation thereover, for he may destroy it or apply it to his own private use. Earl of Halsbury, *The Laws of England*, 39:731, at p. 541 (1962); citing Hale's *De Jure Maris* and *Simpson v. Attorney General.* In accord, H. Coulson and U. Forbes, *The Law Relating to Waters*, p. 485 (4th Ed. 1924).

The precedent which is relevant to this controversy may be found in the maritime law of the nineteenth century, the time during which private canals flouished and constituted a significant method of maritime transportation in the United States. At that time it was clear that the law relating to artificial water courses was totally different from the law relating to natural streams. Although artificial waterways constructed on private land and used as a highway for commerce may be subject to federal admiralty jurisdiction and federal regulatory power, they remain private vis-a-vis the public generally and are not burdened with a servitude of navigation.

> Private canals built upon private property are subject to the control of their owners. The use of such canals being merely permissive the public acquire no vested rights therein. 6 Encyclopedia of Law and Procedure 267 (1903) at 276.

Similarly,

> A waterway which is a mere private enterprise is like a private road over which the public may be

> permitted to travel, but on which, unless dedicated to its use, it obtains no vested rights. The proprietor of a tract of land has the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal, for the purposes of navigation, and to require payment for its use from those who choose to avail themselves of its facilities. 5 American and English Encyclopedia of law lll (1897) at 114. [19]

> But no appropriation of land or right to the flowage can be made without compensation, nor until the requirements of the law authorizing such taking have been complied with. 28 American and English Encyclopedia of Law (1895) at 1044. [20]

These nineteenth century decisions have been followed in more recent times.

> Where waters were not previously navigable, the public does not acquire the right to navigate an artificial channel made by the owners of the underlying soil. 65 Corpus Jurus Secundum, "Navigable Waters", §20, at p. 132. [21]

19. Citing: *Potter v. Indiana, etc., R. Co.*, 95 Mich. 389, 54 N.W. 956; *Ward v. Warner*, 8 Mich. 508, *Harvey v. Potter*, 19 La. Ann. 264, 92 Am. Dec. 532; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525.

20. Citing: *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. (U. S.) 101; *Farnum v. Blackstone Canal Corp.*, 1 Sumn (U.S.) 46; *Trenton Water Power Co. v. Raff*, 36 N.J.L. 336; *Ten Eyck v. Delaware, etc., Canal Co.*, 18 N.J.L. 201; 37 Am. Dec. 233.

21. Citing: *King v. Muller*, 67 A. 380, 73 N.J. Eq. 32; *Fairchild v. Kraemer*, 204 N.Y.S. 2d 823, 11 A.D. 2d 232. See also 12 C.J.S. "Canals", §. 31; 13 Am. Jur. 2d, "Navigable Waters", §. 92.

Though this Court has applied federal admiralty jurisdiction and regulatory power to other than natural waterways, the navigation servitude has never been applied to artificial canals constructed on fast land. In fact the servitude has never been applied to non-navigable waters without an express determination by Congress that inclusion was essential to a comprehensive navigable waters improvement program. *United States v. Cress*, 243 U.S. 316, 325-326 (1917). It becomes more important than ever to recognize that the navigation servitude is not coextensive with Commerce Clause regulatory authority.

Veazie v. Moor, 55 U.S. (14 How.) 568 (1852), though not directly on point with the present controversy, is analogous. There the state of Maine conferred on Moore the right to improve the upper non-navigable stretches of a navigable river and to have the exclusive license to navigate the improved stretch. Veazie contested this authority since he was licensed for the coasting trade by the United States as in *Gibbons v. Ogden*.[22] In distinguishing *Gibbons v. Ogden*, this Court recognized the lack of a public right to navigate privately improved non-navigable internal streams.

> A license to prosecute the coasting trade, is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a State, or the water courses partaking of the character of canals exclusively within the interior of the State, and made practicable for navigation by the funds of the state, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose

22. 22 U.S. (9 Wheat.) 1 (1824).

> like this, is, in the first place, a departure from the obvious meaning of the document itself, and an abuse wholly beyond the object and the power of the government in granting it. 55 U.S. (14 How.) at 575.

Is there any justification for believing that this same reasoning should not apply to artificial canals constructed on privately owned fast land at private expense? The private nature of artificial canals has been recognized by this Court. *Perrine v. The Chesapeake and Delaware Canal Co.*, 50 U.S. (9 How.) 172 (1850).

The United States Attorney General has also recognized the lack of a public right to navigate a state's privately improved non-navigable internal waters. In a situation involving an internal waterway in the State of Illinois, the right was recognized as to improved navigable streams. As to those parts wholly artificial, the opinion concluded:

> Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within the admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner, and deprive the latter of any return upon it. 36 Opinion U.S. Attorney General 203, 214 (1930).

Finally, regulations of the United States Corps of Engineers recognize the existence of private waterways not burdened with a public servitude. In so recognizing, the regulation points out the distinction between the servitude and federal power to regulate.

> Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private water body, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities. 33 C.F.R. § 329.8(a)(3).

The purpose of the Louisiana Organic Act and the navigation servitude was to aid navigation and to preserve the nation's natural waterways for public use. It was never intended that the owner of fast land should open his private property to public use merely because he constructed an artificial canal thereon. With the realities of South Louisiana geography, the Constitutional right to private property and Fifth Amendment protection would suffer a serious blow by any construction of the Louisiana Organic Act or the navigation servitude which extends their meaning to non-natural artificial waters. A pretension as far reaching as this is "an abuse wholly beyond the object and the power of the government granting it." *Veazie v. Moor*, 55 U.S. (14 How.) 568, 575 (1852).

B. Private Artificial Canals Which Form No Highway of Interstate Commerce Are Not Subject to the Federal Navigation Servitude Merely Because They Are Navigable In Fact and Intersect With Navigable Waters of the United States.

All of the cases that have heretofore dealt with the navigation servitude have involved natural waters, not artificially constructed canals. As early as *The Daniel Ball*, supra, which extended the term "navigable waters of the United States"

to those waters navigable-in-fact, the servitude has been confined to natural waterways. Only those rivers and streams which in their "natural" or "ordinary" condition were subject to the servitude should now be so burdened. As already noted, the broad federal powers of admiralty jurisdiction and Commerce Clause regulation could go beyond this "natural or ordinary condition" barrier, but the navigation servitude should not be so extended in the absence of other factors. The right of private property and the Fifth Amendment stand as a rigid barrier to such an extension. Citation of authority by Petitioners (Pet. Brief p. 13) and by the Solicitor General (U.S. Brief pp. 27-28) would lead this Court to believe that the navigation servitude has been extended to artificial waterways but, as has already been explained, those decisions involved application of admiralty jurisdiction or Commerce Clause regulatory power.

This Court has qualified the term "navigability" with "natural or ordinary condition" almost every time the opportunity has come up to discuss the subject. The multitude of cases cited by Petitioners and the Solicitor General support this qualification and other decisions of this Court are in accord. *Brewer Elliott Oil and Gas Co. v. United States,* 260 U.S. 77 (1922).; *United States v. Utah,* 283 U.S. 64 (1931). The federal circuit courts express agreement that "natural or ordinary condition" is a qualification of "navigability." *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F.680 (6th Cir. 1898); *Harrison v. Fite,* 148 F. 781 (8th Cir. 1906); *Gulf and Interstate Ry. Co. of Texas v. Davis,* 26 F.2d 930 (S.D. Tex. 1928); *Pennsylvania Water and Power Co. v. Federal Power Commission,* 123 F.2d 155 (App. D.C. 1941) *cert. denied,* 315 U.S. 806 (1942); *State of Utah v. United States,* 304 F.2d 23 (10th Cir. 1962), *cert denied,* 371 U.S. 826 (1962); *Leslie Salt v. Froehlke,* 578 F. 2d 742 (9th Cir. 1978); *Goose Creek Hunting Club v. United States,*

518 F. 2d 579 (Ct. Cl. 1975). The state courts are in accord. *Potter v. Indiana,* 95 Mich. 389, 54 N.W. 956 (1893); *Sneed v. Weber,* 307 S.W. 2d 681 (1958).

An additional element of the navigable-in-fact, therefore navigable-in-law rule is the waterway's role in interstate commerce.

> By navigable waters of the United States are meant such as are navigable in fact, and which by themselves or their connection with other waters form a *continuous channel* for commerce with foreign countries or among the states. (emphasis ours). *Miller v. New York,* 109 U.S. 385 (1883).

Since the origin of the federal navigation servitude and federal regulatory jurisdiction are in the Commerce Clause, it is only reasonable to require the navigable character to be in relation to interstate commerce. Therefore to be considered navigable the river or stream must form in its natural or ordinary condition an interstate highway for commerce.

Both Petitioners and the Solicitor General allege that Respondent's canal system connects with the Gulf of Mexico and other navigable waters of the United States and thereby becomes an integral part of those waterways.[23] However these statements are contrary to the record before this Court. Respondent's canal system lies in an area situated primarily between several "navigable waters of the United States." It does not connect with the Gulf of Mexico[24] and does not form a highway over which commerce may be carried on with other states. It does not "connect" two or more navigable waters of the United States. The canals form a unitary

23. Pet. Brief pp. 5, 12, 15, 16, 23; United States Brief, pp. 2, 8, 10, 28, 30).

24. Appendix pp. 33a, 43a-44a.

canal system which was built and is continuously maintained for the purpose of providing the most expeditious means of access to Respondent's leasehold .[25] All of the canals were constructed in fast land by Respondent, its lessor, or someone in privity with its lessor .[26] The canals are used by Respondent, its lessor, and its trapping, hunting, fishing and grazing lessees. Use of the canal system has always been subject to the permission of Respondent .[27] For this reason the canals are continuously posted and patrolled. [28]

Respondent's canal system is no different from private roads constructed on a farm for the purpose of planting cultivating, and harvesting crops. The fact that they intersect in some places with "navigable waters of the United States" is irrelevant since these few connections only provide an entrance into Respondent's leasehold and do not thereby cause an interstate highway of commerce to be created. The only use of the canals is by Respondent's lessor to gain access to drilling locations and by Respondent's lessees to provide access to hunting, fishing, trapping and grazing leases. The fact that canals rather than roads were built to provide access to Respondent's leasehold is only a recognition of the physical impossibility of building roads in low marsh land. Without these private artificial canals, most the land in Respondent's leasehold would be rendered inaccessible and unproductive.

The federal courts have recognized that in order to be subject to the navigation servitude the waterway must form an interstate highway of commerce. *Leovy v. United States,*

25. Id. pp. 26a, 28a, 31a, 45a.

26. Id. pp. 15a, 30a.

27. Id. pp. 16a, 39a, 42a.

28. Id. pp. 12a-14a, 16a, 51a.

177 U.S. 621 (1900); *Dow Chemical Co. v. Dixie Carriers, Inc.*, 330 F. Supp. 1304 (S.D. Tex. 1971), *aff'd.*, 463 F.2d 120 (5th Cir. 1972), *cert. denied,* 409 U.S. 1040 (1972); *Hardy Salt Co. v. Southern Pacific Transportation Co.*, 501 F.2d 1156 (10th Cir.) 1974), *cert. denied,* 419 U.S. 1033 (1974); *Minnehaha Creek Watershed District v. Hoffman*, 449 F. Supp. 876 (D. Minn. 1978), *aff'd.*, 13 E.R.C. 1009 (8th Cir. 1979).[29] Respondent's canals provide access into the interior of Respondent's leasehold and that is all. They are not transformed into an interstate highway of commerce because the owner uses them "as access to navigable waters of the United States for the carriage of his own goods any more than using a private driveway for access to public highways by motor vehicle traffic can be said to grant public access to the driveway."[30]

29. The Solicitor General cites *United States Geophysical Co. v. Vela,* 231 F.2d 816 (5th Cir. 1956), for the proposition that Respondent's canals have become an integral part of navigable waters of the United States by virtue of their intersection with such waters. However that case dealt with admiralty jurisdiction over an artificial canal that in fact supported interstate commerce. Petitioners seem to place great reliance on *United States v. Sexton Cove Estates,* 526 F.2d 1293 (5th Cir. 1976), which we have already distinguished as having involved Corps of Engineers regulatory authority. In a case decided the same day as *Sexton Cove Estates* the Fifth Circuit explained its decision in that case by saying:

> As we have this day explicated in *United States v. Sexton Cove Estates*. . ., the Corps *may* under certain circumstances exercise jurisdiction over dredging and filling operations above mean high tide line under Section 403 of the Rivers and Harbors Act. *Prerequisite for such jurisdiction are factual circumstances showing some effect upon navigable waters*, some alteration or modification of either course, location, condition or capacity of those waters. (emphasis ours). *United States v. Joseph G. Moretti Co.*, 526 F.2d 1306, 1309 (5th Cir. 1976). See also *United States v. President, etc., of Jamaica and R. Turnpike Co.*, 204 F.759 (2d Cir. 1913).

30. *Vaughn v. Vermilion Corporation,* Docket No. 77-1819, Louisiana Landowners Association Brief note 7 at p. 14.

Finally, it is alleged by Petitioners that since Respondent's Canals are subject to the ebb and flow of the tide, they thereby become "navigable waters of the United States" and are burdened with the navigation servitude. It is undisputed that Respondent's Canals exhibit some tidal action.[31] However this is but a reality in the low lying marsh areas of Louisiana's coast. The origin of the ebb and flow of the tide test was in English law and served a purpose suited for English geography. *Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). The test was early declared not to be "any test at all" by this Court. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

The rejection of the ebb and flow of the tide test is illustrated further by this Court's decision in *Leovy v. United States*, 177 U.S. 621 (1900), where the Court considered the navigability of Red Pass in the Mississippi River delta. The Court considered the issue entirely in terms of navigable-in-fact and did not suggest that any tidal portion of the pass would for that reason be considered navigable. The lower federal courts are in accord that the ebb and flow of the tide does not provide a valid test of navigability. *United States v. American Cyanamid Co.*, 354 F. Supp. 1202 (S.D. N.Y. 1973), *aff'd.*, 480 F. 2d 1132 (2d Cir. 1973); *United States v. Sexton Cove Estates*, 526 F.2d 1293 (5th Cir. 1976).

The Corps of Engineers has attempted to extend its regulatory authority over all waters, artificial or otherwise, which are subject to the ebb and flow of the tide by declaring such to be navigable waters of the United States. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3rd Cir. 1974), *cert denied*, 420 U.S. 927 (1975), approved of such an extension as to a tidal saltwater marsh, but in relation to an artificial canal, in *United States v. Sexton Cove Estates*, the Fifth Circuit said:

31. Appendix p. 47a.

> Exhibition of tidal fluctuation subsequent to excavation does not prove alteration or modification of course, condition, location, or capacity. If it did, every hole dug in South Florida would be within the Corps' jurisdiction. The Corps' jurisdictional fingers do not reach that far. 526 F.2d at 1299 (1976).

However, the Corps recognizes that its regulatory jurisdiction and the navigation servitude are not co-extensive for its regulations concede that "a privately constructed and operated canal" not used in interstate commerce remains private. 33 C.F.R. § 329.8(a)(3).

Respondent's wholly artificial canal system constructed on private fast land at private expense did not become subject to a right of public access or navigation servitude merely because it is navigable-in-fact, exhibits some tidal action and connects in some places with "navigable waters of the United States". No decision of this Court has ever held otherwise and Respondent asks this Honorable Court to rule likewise.

C. Respondent's Canal System Did Not Destroy or Obstruct Navigable Waters of the United States and This Issue Is Not a Disputed Fact.

Petitioners claim that "at all times in this litigation" they "have alleged that the old Freshwater Bayou, on and prior to the time of the development" of Respondent's artificial canals "existed in a natural state" and "was a natural and actual marine highway of commerce" and "became unusable only when" Respondent's "ancestors in title built the artificial navigable waterways in the area."[32] The Solicitor Gener-

32. Petitioners' Brief pp. 6-7.

al asserts that it is "the unchallenged fact in this case" that a natural navigable waterway was impaired and allowed to silt up as a result of cutting a new channel off an existing waterway.[33] Respondent takes issue with these statements. This allegation does not represent an "unchallenged fact" for the precise reason that it is not so, has not been alleged at all times in this litigation, and no direct evidence in the record supports this assertion.

When Respondent originally filed suit for an injunction prohibiting Petitioners from trespassing in Respondent's private artificial canals, Petitioners answered alleging that these canals were subject to a public right of access by virtue of the navigation servitude. Their allegation that natural waterways were obstructed or destroyed was not pled as an affirmative defense as required by Louisiana Code of Civil Procedure Article 1005.[34] The first time Petitioners made any mention of obstruction or destruction of naturally navigable waters was by an affidavit in opposition to Respondent's Motion for Summary Judgment filed shortly before the day on which the motion was heard. A review of the affidavit signed by the Petitioners reveals that the affidavit does not state specific facts within Petitioners' personal knowledge that raise material issues for trial as required by Louisiana Code of Civil Procedure Article 967. Furthermore, the affidavit was not made on personal knowledge as required, Petitioners only alleging that they "are aware that ...."

The Solicitor General states that "Petitioners' claim that the maintenance of the canal system destroyed the prior channel was rejected as a matter of law as an insufficient

33. United States Brief p. 31.

34. Appendix pp. 8a-10a.

defense and must be taken as true at this stage in the proceedings."[35] Petitioners would likewise have the Court believe this.[36] Respondent contends that this is patently incorrect. The Louisiana Court of Appeal for the Third Circuit rejected the defense of possible obstruction or destruction of natural waterways based on *Ilhenny v. Broussard*, 135 So. 669 (La. 1931). That case held that the subject matter of diverting the water of a navigable stream had been placed by Congress under the jurisdiction of the Secretary of War and it was not for the Louisiana court to fashion such a remedy as providing access in the new channel. *Vermilion Corporation v. Vaughn*, 356 So. 2d 551 (1978) at 554.[37]

The fact remains that this assertion is not unchallenged and cannot be accepted as true since it was not raised by Petitioners in their answer. Even if properly raised the issue is not free from doubt. The record before this Court supports the contrary. Little Freshwater Bayou, a drainage coulee, was silted up by "accretion caused by the westerly current and bringing the silt from the Atchafalaya River west-

35. United States Brief, Note 4 at p. 4.

36. Petitioners' Brief p. 7.

37. Petitioners cite this Court's opinion in *Huse v. Glover*, 119 U.S. 543 (1886), and claim that it inferentially supports the proposition that a private party cannot retain exclusive use of a canal that renders a natural channel unusable (Pet. Brief p. 18). *Huse v. Glover* is inapposite. It dealt with the authority of a state to improve a natural waterway and charge tolls for the use of the improvements. *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) and *Dwinel v. Barnard*, 28 Me. 554 (1848) cited by the Solicitor General are also inapplicable. (U.S. Brief p. 31). *Philadelphia Co. v. Stimson* involved an attempt by a state to restrict the public right of navigation to within the river's ancient lines which the Court said did not destroy Congressional right to regulate. *Dwinel v. Barnard* did in dicta say that when a natural stream is obstructed the public should have the same access as they had before; however, the Court found that there had been no obstruction and properly held that a person who constructs a private watercourse may withhold its use from the public.

ward."[38] The development of Respondent's Dewitt Canal "would not have had any effect on that."[39] At any rate this "drainage coulee" never supported any traffic other than trappers in pirogues.[40]

The only other natural waterway in the area was Freshwater Bayou which terminated at Boat Point, on lands owned by Respondent's lessor.[41] Although Freshwater Bayou may have been navigable at one point in time,[42] the Corps of Engineers incorporated this bayou into the Freshwater Bayou Canal which was developed between 1964 and 1968. Respondent and Respondent's lessor granted a servitude by gratuitous donation to the Corps of Engineers in 1962 to construct a new route from Intercoastal City to the Gulf of Mexico. This project incorporated and re-routed portions of natural Freshwater Bayou with Six Mile Canal and Belle Isle Canal to form Freshwater Bayou Canal. Freshweater Bayou Canal is a "navigable water of the United States" and is subject to a public right of access all by virtue of Respondent's gratuitous donation.[43] What was originally the entrance to Freshwater Bayou from the Gulf of Mexico was converted into a spoil disposal area and completely blocked by the Corps of Engineers in connection with their construction of Freshwater Bayou Canal. Any natural navigability of Freshwater Bayou was destroyed when the Corps of Engineers re-routed it and constructed Freshwater Bayou Canal.

38. Appendix p. 33a.

39. Id.

40. Id. p. 34a.

41. Id. p. 35a.

42. Id.

43. Id. pp. 35a-38a.

No state or federal governmental agencies have ever attempted to assert dominion, control or public access on any of Respondent's canals.[44] The Corps of Engineers did not assert any type of servitude when plans were made to construct Freshwater Bayou Canal. The Corps asked for a servitude and it was donated to them by Respondent and Respondent's lessor. It was the donation of the servitude and the subsequent construction of Freshwater Bayou Canal that has caused Respondent's canals to intersect with "navigable waters of the United States" in as many places as they do. Permits from the Corps of Engineers have always been sought before connecting any artificial canals with "navigable waters of the United States."[45] The Corps has always recognized the private nature of Respondent's canals and has never asserted any rights of public access over the canal system.[46]

44. Id. pp. 48a.

45. United States Brief note 18 at p. 32.

46. The Solicitor General points to language in the Corps of Engineers' permits regarding Respondent's canal which provides that "no attempt shall be made by the permittee or owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure." (U.S. Brief at Note 18, p. 32). The Solicitor General interprets this language as allowing public access in all of Respondent's canals. The fallacy of this argument is clear beyond any doubt. As previously noted, neither the Corps of Engineers nor any other state or federal government or agency has ever attempted to interfere with the private nature of Respondent's canals. The Corps' permit referred to was issued to allow Respondent's lessor to connect one of the private artificial canals involved with a "navigable water of the United States" which may have been burdened with the navigation servitude. Thus the quoted permit language, when requiring free public access "at or adjacent to the work or structure," refers to those intersection or connection points as the "work or structure" not the entire private canal system leading into the interior of Respondent's leasehold.

IV.

THERE ARE COMPELLING POLICY CONSIDERATIONS WHY THE FEDERAL NAVIGATION SERVITUDE SHOULD NOT BE EXTENDED TO RESPONDENT'S PRIVATELY CONSTRUCTED CANAL SYSTEM UPON ITS PRIVATE LANDS.

For the reasons detailed in the foregoing portions of this brief, the judgment of the Louisiana courts is correct as a matter of law and should be affirmed. In addition, the general rule that law does not grow out of a vacuum, but is responsive to practical needs and considerations, is applicable and there are compelling practical and policy reasons which fortify this conclusion.

The canal system to which public access is herein sought by Petitioners for their private economic gain is located in a 125,000 acre tract of land leased by Respondent on the southern coast of Louisiana along the Gulf of Mexico.[47] Louisiana has over four million acres of marshland scattered along the state's relatively undefined coast. There is urgent need for maintaining these marshlands as a habitat for fish and wildlife.

In common with other land along this coast, Respondent's leasehold is characterized by a fragile ecology subject to disturbance by natural forces such as frequent flooding and a tremendous amount of silt carried into the Gulf of Mexico by the Atchafalaya River, which drains one-third of the flow of the Mississippi River, much of which finds its way back into these marshes, and general erosion caused by both natural and man-made phenomena. These lands are generally

47. Appendix p. 50a.

recognized to be a unique natural resource as a habitat for fish and wildlife; this recognition is reflected in a general consensus that their survival should be protected by careful management.

This consensus is most clearly evidenced by the fact that many thousands of Louisiana's coastal marshlands are currently under a water management program providing a habitat for migratory water fowl, fur-bearing animals and the North American alligator. Implementation of this program requires construction of levees, constant maintenance of canals, and regulation of water levels and salinity balance. The success of this program has provided feeding grounds for the greatest concentration of migratory water fowl on the Gulf Coast, the population of which far exceeds what could be sustained under natural conditions

Adjoining Respondent's Lands are two wildlife refuges – the Rockefeller Refuge and Game Preserve on the west, operated by the State of Louisiana, and the Paul J. Rainey Wildlife and Game Preserve on the east, operated by the National Audubon Society. Immediately to the east of and adjoining the National Audubon Society area is the Russell Sage Wildlife Management Area, also operated by the State of Louisiana. In all, the State of Louisiana operates thirty-five wildlife management areas with a total acreage of nearly one million acres, many of which lie within the coastal marshes of Louisiana. Water management programs are conducted on many of these wildlife refuges and management areas. See *A Guide to Wildlife Management Areas*, Louisiana Department of Wildlife and Fisheries, 1978.

In the last twenty years the increased demand in this country for energy sources has caused a rapid growth of oil and gas exploration efforts in Louisiana's coastal marshes.

This "increased tempo of oil and gas exploration, coupled with the use of the coastal marshes for inland waterways, has introduced additional water control problems to the marshland property owner. It has become necessary to maintain canal levees and construct new ones to improve the marsh or return it to its previous ecological position." Technical Report of the Louisiana Wildlife and Fisheries Commission, *Rockefeller Refuge Levee Study*, New Orleans, 1959.

Unfortunately, but realistically, the accomplishments of water and wildlife management programs must be protected against persons unconcerned with the public good by systematic and constant patrolling to prevent selfish and uncontrolled hunting, fishing and trapping and also to prevent the erosion of canal banks from wash created by excessive and reckless use of Respondent's canal system. The nature and extent of Respondent's leasehold being such that fencing is impractical and the canals providing ready access to most parts thereof, extension of the navigation servitude will as a practical matter prevent Respondent's denying access to its canal system to anyone and its ability to manage and control water and wildlife will be so severely hampered as to be virtually destroyed.

The Solicitor General's argument that "the navigating public cannot be expected to know whether the opening to navigable channels is natural or man-made" and this "would reintroduce the very evil that the navigation servitude was designed to avoid and would impose an intolerable and unworkable burden on navigation"[48] misconceives the nature of the canal system herein at issue and the use sought by Petitioners. This system does not form and is not used as a highway of commerce nor as a link in a network of highways so

48. United States Brief p. 31.

used such that the pretended evil cited by the Solicitor General would ever occur. Warning signs are prominently posted wherever Respondent's canals intersect the boundaries of Respondent's leasehold as well as throughout the system at over 400 locations, so that no one could plead uncertainty as to what bodies of water constituted Respondent's private canals. The Solicitor General's concern is wholly misplaced.[49]

Nor, as the Solicitor General argues will the price of public access be small.[50] Respondent has carefully maintained the area for hunting, trapping and fishing leases. Levees have been built to provide rich pasture land for Respondent's cattle grazing leases. Respondent's ability to patrol and enforce its leases, presently facilitated by personal acquaintance with and recognition of its lessees, will be made far more difficult, if not impossible, by the indiscriminate presence of "public" users of its canal system providing access to lease sites. Poachers will be virtually impossible to control, thus destroying the value of hunting and trapping leases and the income therefrom and protection of the animal population from unrestricted taking of wildlife. Grazing lessees will be threatened with potential loss of their cattle. The "small price" of implementing the "navigation servitude", completely inappropriate to Respondent's private canal system, could be effective destruction of Respondent's carefully preserved ecologically stable wildlife management area.

49. The court is respectfully reminded that Petitioners herein are not users who might inadvertently use Respondent's private waterways incident to their use of public waterways but are residents of the area having full and intimate knowledge of the location and extent of Respondent's canal system and desiring to exploit its resources for their private gain.

50. United States Brief p. 13.

Who will pay for the loss suffered by Respondent in throwing open its leasehold to public access? The United States has admitted in the Kaiser Aetna case that it has not budgeted a cent for the maintenance of Kuapa Pond. Is there any reason to believe the situation will be different in Respondent's case in which neither the United States nor any state or federal agency has ever expressed an interest in these private artificially constructed canals?

In addition to the adverse effect on trapping, hunting, fishing and grazing leases by extending the navigation servitude to Respondent's privately constructed and maintained canal system, there would be a disincentive to mineral development. Since access to drilling sites on Respondent's 125,000 acres -- and all similar coastal marshland areas – can be economically had only by dredging canals, potential mineral lessors would be forced to weigh the possibility of successful mineral development against the certainty of public access to their property by use of the canals to provide access to drilling sites. [51]

Finally, the increase in traffic through Respondent's canal system if thrown open to the public will seriously and significantly increase erosion of the canal banks and levees. The lands forming the banks of Respondent's canals are almost entirely alluvial and organic in nature; the consequence is that wave wash from increased and uncontrolled boat traffic will widen the canals and erode their banks and levees.[52]

51. Public access would be certain because application of the navigation servitude would occur upon dredging of the canal, without reference to whether mineral production occurred or not.

52. The danger of erosion of canal banks and levees is real and not mere speculation. In a 1961 study done for the Louisiana Wildlife and Fisheries Commission Refuge Division entitled "Erosion of Canal Banks on the Rockefeller Wildlife Refuge" this problem was studied in depth and some rather astonishing statistics compiled. This study, performed on the Rockefeller Wildlife Refuge which immediately adjoins Respondent's leasehold on the west, involved identical canal systems constructed at about the same time and by the same concerns as Respondent's. In the introduction to this study the problem is summarized:

> The oil company canals on Rockefeller Refuge are widening at an alarming rate. The average width of canals in the Humble System is now 212 percent of the original width. Canals of the Superior System are 242 percent of the original width, about 2 ½ times. The Humble System canals are currently widening at an average rate of 0.353 feet per month. Canal berms and levees in marsh areas are not resistant to erosive forces. Therefore, canals will widen in direct ratio to usage. "Erosion of Canal Banks on the Rockefeller Wildlife Refuge." Page 1.

This study concludes that canals widen primarily as a result of wave action created by boat traffic. Boat traffic in turn aggravates wind driven waves creating further erosion. The soft unstable marsh through which these canals are constructed is not resistent to erosion. "The canals have widened to the extent that the levees are now being destroyed. The average levee height is only a foot and a half above the surface of the marsh and if the system is to remain a fresh water system, future levee raising will be necessary."

An update to this 1961 study was made in 1964. The statistical information shows that in 1964 the Humble canals showed from 218% to 269% increase in initial width from their construction in 1940. In the period from 1958 to 1964 this widening increased from 27% to 49% over initial width. This last percentage information reflects a monthly erosion factor of 0.240 feet per month to 0.427 feet per month.

The canals on Respondent's property would reflect similar increases in width. The marsh and canals through which they are built are similar if not identical. Increased traffic and boat speed from 1964 to the present have no doubt increased the problem to astronomical proportions. Canals constructed in marsh will widen and become a traffic maintenance problem when subjected to extended and intensive usage. Amount of usage and boat speed are factors that the landowner has in

Since much, if not most, of the animal population of the swamps tend to inhabit the banks, such widening and erosion will reduce the fur-bearing animal and alligator populations, adversely affecting the characteristics of Respondent's lands as a wildlife refuge, and contract their habitat, directly lessening the value of Respondent's trapping and hunting leases.

As is pointed out hereinabove, the access sought in these proceedings to Respondent's privately constructed and maintained canal system is not for passage such as is traditionally associated with exercise of the navigation servitude. Rather, access is sought to permit Petitioners to conduct shrimping and fishing activities for their private gain on what the courts of Louisiana have historically and consistently held to be private property subject to the usual and customary incidents of private ownership. To open Respondent's canal system to exploitation by Petitioners for private gain, without compensation to Respondent, under the guise of invoking the servitude of navigation would be a perversion of that doctrine, unwarranted in law and indefensible in practice. Perhaps it is best to recall the admonition once given by Justice Holmes when he said:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

In conclusion, first, Petitioners' application to this court for relief is procedurally deficient because of their failure to raise a claim to rights and privileges under the Louisiana Organic Act in the state court proceeding and because no private right of action insures to their benefit under the Rivers and Harbors Act. Therefore, the writ should be dismissed.

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his control as long as his property remains private. Subjecting private property to public use emasculates the owners ability to control the usage and therefore prevent the erosion and destruction of his property.

Second, Petitioners' application lacks legal merit because the navigation servitude sought to be invoked by them is not coextensive with the Federal power to regulate the use of navigable waters, but is narrower and is limited by the constraints of due process and the necessity for compensation when private property is taken for public purposes.

Third, Respondent's canal system, having been dredged through private land, using private funds, for private purposes and having at all times been maintained and used as a private system, constitutes private property not subject to the Federal navigation servitude.

Finally, apart from and in addition to these purely legal reasons, there are compelling practical considerations militating the affirmance of the judgment of the Louisiana Court of Appeal for the Third Circuit.

For all of these reasons, the judgment sought to be reviewed should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD, PETITIONERS

v.

VERMILION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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v.

VERMILION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE[1]

QUESTION PRESENTED

Whether an artificially constructed navigable waterway, privately built and maintained and situated on private land but connecting with navig-

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[1]On October 2, 1978, the Court invited the Solicitor General to express the views of the United States concerning the issues presented by the petition for certiorari. We did so in December 1978 and the petition was granted on February 21, 1979. This is our brief, as amicus curiae, on the merits.

able waters of the United States, is a navigable water of the United States to which the public has a federally protected right of navigational access.

STATEMENT

Respondent Vermilion Corporation is the lessee of a large tract of land in Vermilion Parish, Louisiana. On this land is a network of canals that connects with the navigable waterways of the Gulf Intercoastal Waterway on the north, the Gulf of Mexico on the south, the West Cheniere Au Tigre Canal on the east, and the Rollover Bayou on the west (Pet. App. A-8). The canals were built in the 1940's and thereafter and have been maintained by respondents, its lessor, or their predecessors or agents (*id.* at A-21.)[2] The canals are sixty feet wide and eight feet deep, are subject to tidal fluctuations, and are navigable in fact, being regularly used by a variety of vessels (*id.* at A-8).[3]

Respondent brought this action to enjoin petitioners from entering the canals and engaging in fishing and shrimping in the canals (Pet. App. A-20, A-33). In their answers, petitioners interposed the affirmative defenses that the canals are "navigable waters of the United States" and thus "burdened with a paramount easement of use in favor of the public," and that respondent's attempt to restrain petitioners' use of the canals constituted an obstruction of navigable waters in violation of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* (Pet. App. A-37 to A-38, A-41, A-45).

[2]The canals were built in the 1940's and thereafter (Dep. of John Donohue, May 10, 1977, at 10-20).

[3]Among other vessels, the canals are navigated by oilfield vessels, drilling barges and support vessels, towboats and tugboats and crew boats, and by work boats (see Dep. of John Donohue, May 10, 1977, at 20).

The trial court granted summary judgment for respondent (*id.* at A-2) over petitioners' objection that there were substantial issues of fact. Petitioners submitted an affidavit (*id.* at A-109 to A-110) asserting that, for as long as they could remember:

> the Humble Canal System has been used by fishermen, hunters, trappers, sportsmen, and generally anyone who wanted to use same. Broussard's and Hazel's Landings have been public landings and launch ramps on the Humble Canal System for years.

The affidavit also asserted:

> Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system in the area of Pecan Island, for example, Little Rollover Bayou and Freshwater Bayou, were actually used for purposes of transporting mail, transporting cattle, and transporting people, to and from Pecan Island on various kinds of small vessels. These natural waterways only ceased to be useable for these purposes after Humble developed its artificial waterway system.

The Louisiana district court granted respondent's summary judgment motion. It held that there was no right of public access to the canal systems because they were constructed with private funds on

private property, were privately maintained, and their use had been restricted to persons given permission by respondent (*id.* at A-2). The court rejected as a matter of law the claim that the diversion of navigable waters of the United States made the canals a public waterway (*id.* at A-2).[4] The Louisiana Court of Appeal, Third Circuit, affirmed on the same grounds (*id.* at A-9 to A-11). The Supreme Court of Louisiana denied review (*id.* at A-18 to A-19).

SUMMARY OF ARGUMENT

I

Public navigation on all navigable waters is a historic right. English common law held that the beds of navigable waters were owned by the Crown in trust subject to a servitude of public navigation. When this country was colonized, Crown charters

[4]It is undisputed that prior to the building of the canal system there were several naturally navigable channels in the area. (See Dep. of John Donohue, May 10, 1977, at 15-17; Aff. Norman Vaughn, May 23, 1977, at 1-2 (Pet. App. A-109 to A-110).) It also seems undisputed that these ceased to be passable after the canal system was built due to an accumulation of silt and/or spoil in the natural channel (Dep. of John Donohue at 15). The dispute is over whether the blockage resulted from the creation and maintenance of respondent's canal system (*ibid.*). It is possible that dredging in the canal system, has caused silt to settle in the original bed. (See *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974) (silt accumulation in natural channel due to dredging.)) There is no need to speculate on that point, however, for petitioners' claim that the maintenance of the canal system destroyed the prior channel was rejected as a matter of law as an insufficient defense and must be taken as true at this stage in the proceedings.

were also deemed to convey title to the beds of navigable waters in the American Colonies subject to a servitude for public navigation. *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413, 414 (1842). Upon the American Revolution, title to the beds of such streams passed to the states, subject, again, to the servitude for public navigation. *Shively* v. *Bowlby*, 152 U.S. 1, 14-15 (1894).

Of course, a common-law rule, however historic, may be altered by the states so long as no federally protected right is abridged. There is no federal statute of nationwide applicability which provides that the public may navigate the navigable waters of this country. Such a statute has never been thought necessary, however, for it has been taken for granted from the first that the Commerce Clause itself precludes the states from conferring private monopolies on navigation.

"All America understands," Chief Justice Marshall wrote in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824), "the word 'commerce' to comprehend navigation. It was so understood * * * when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government * * *." In the Commerce Clause, the states surrendered their common-law power to eliminate the public navigational servitude with respect to the "navigable waters of the United States," that is, the rivers and streams which directly or indirectly together form a continuous highway for actual or potential commerce between the states. Although the states may regulate activities on the navigable waters, the Commerce Clause prohibits private owner-

ship of the streams themselves. As the Court has held, the title to the bed of navigable waters is, by virtue of the Commerce Clause, "subject absolutely to the public right of navigation * * *." *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82, 87 (1913). The navigable waters of the United States are "the public property of the nation," and the notion that "the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 63, 69 (1913).

Were the rule otherwise, navigation would be severely impeded. The beds of navigable waters may be vested in hundreds of private or public owners. Ownership may even shift from owner to owner under the various state rules of avulsion and accretion. See *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Navigation on these waters would be a futile exercise if vessels were required to purchase the right to navigate over the bed of each owner. The difficulty in locating each owner, the cumulative burdens they might impose, and the risk of a "hold-up" by a single owner would rob the "highway of commerce" of all of its utility.

Congress, moreover, has long taken for granted the public right of navigation and has premised decades of legislation on the premise that, although the federal government may restrict public navigation, the Commerce Clause of its own force precludes any state from conferring a private monopoly over the navigable waters of the United States. Since at least 1816, for example, Congress has appropriated billions of dollars in periodic "rivers and harbors"

bills for the improvement of harbors, rivers, creeks and lakes by the Secretary of War (now the Secretary of the Army). To protect this investment and to preserve the waterways of this country, Congress enacted a series of laws, eventually culminating in the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, prohibiting any obstruction to the navigable capacity of the navigable waters of the United States. What is more, 33 U.S.C. 565 permits a riparian owner to make river improvements approved by the Corps of Engineers at his own expense and risk so long as public navigation is not impeded and no toll is charged, and 33 U.S.C. 1 authorizes the Secretary of the Army to regulate the use, administration and navigation of the navigable waters of the United States. Those statutes, and others, assume the proposition that the public is entitled to navigate the waters so improved, protected or regulated. To hold that the states may exclude the public from navigable waters of the United States within their borders would destroy the *raison d'etre* of this and much similar legislation.

In short, the public has a right to navigate all navigable waters of the United States subject only to any federal laws or regulations which deny access.

II

Respondent's canal system is a navigable water of the United States. The Court's traditional test of navigability is whether the stream is sufficiently navigable to carry commerce or could be made so with reasonable improvements. The canals in question plainly meet this test inasmuch as they are in fact navigable and in fact carry commerce.

Moreover, although this alone is sufficient to demonstrate the navigability of the canal system, the canals also satisfy the older "ebb-and-flow" test for navigability inasmuch as the canals are subject to the tidal fluctuations of the Gulf of Mexico. The canal system is a "navigable water of the United States" because it connects directly to the Gulf of Mexico and thereby forms part of the continuous highway of interstate commerce among the states. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563–564 (1870); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 406–410 (1940).

The fact that the canal system was built on private land and with private funds does not change its character as a navigable water of the United States. To allow such an exception would reintroduce the very evil that the navigational servitude is designed to avoid. It is not always easy to tell whether a waterway is artificial or natural, or whether it is built over a navigable stream (or one which might be made so with reasonable improvements). The riparian owner would have every incentive to resolve such factual issues in his favor and to assert a private monopoly over the waters adjoining his land and thereby appropriate for his exclusive use what in fact belongs to the public. These problems are avoided by adhering to the traditional definition of the navigable waters of the United States and treating "private" canals no differently from natural waterways.

This does not necessarily mean that such canals must admit any and all members of the navigating public. Under 33 U.S.C. 1, the Corps of Engineers

may issue regulations for the use and navigation of the navigable waters of the United States. The "owner" of a canal may request the Corps to issue a regulation restricting public access, just as the Corps has done in regulations restricting public access at or near military facilities. See 33 C.F.R. Part 207. If the Corps determines, after a public hearing, that the interests of navigation would not be adversely affected and that the public interest would be served by such a restriction, then it may issue such a regulation. Such regulations, published in the Code of Federal Regulations, would give notice to all of the navigating public of the restriction.

ARGUMENT

Our only task is to determine whether the injunction issued by the Louisiana courts preventing petitioners' vessels from entering the canal constructed by respondent's lessor is inconsistent with overriding federal law. There are two distinct tests we can apply in making that assessment. One approach is to ask whether the state rule on which the judgment is premised impermissibly trenches on the prerogative of the United States to regulate navigation on the national waterways. But the more direct question is whether the injunction is void as an invasion of the federal right of the public to navigate such waterways. We have chosen that starting place.

At the outset, however, we stress that the two approaches are, for the most part, different paths to the same destination. There is much common

ground. Both the federal power of regulation and the public right of navigation (insofar as it is a federally protected right) attach to all "navigable waters of the United States," a description that includes at least all navigable waters connected directly or indirectly to the sea or to inland waterways that cross state boundaries. Moreover, although the power and the right have different historical origins and are not always evidenced in the same statutes, they share a constitutional anchor in the Commerce Clause. This convergence is relevant because it authorizes us to invoke rulings defining the breadth of the regulatory power as precedents on the question whether the public right of navigation embraces artificial waterways traversing private land.

With this preamble, we turn to the basic proposition: that the navigable waters of the United States are impressed with a navigational servitude in favor of the public which the Constitution and federal law protect against invasion by state or individual action.

I. THE PUBLIC ENJOYS A FEDERALLY PROTECTED RIGHT OF NAVIGATION OVER THE NAVIGABLE WATERS OF THE UNITED STATES

1. The federal navigational servitude descends directly from the English common law. Chapter 32 of Magna Carta confirmed as one of the fundamental "liberties of England," which neither King nor subject could abridge, the right of the public to travel

on the navigable streams. W. McKechnie, *A Commentary on the Great Charter of King John* 343 (Glasgow 1914).[5] English common law held that the title to the seashore and the beds of navigable waterways were vested in the Crown or its grantees (*jus privatum*), but that, whether the Crown retained title to the soil or had granted it out, it was subject to a servitude or right of navigation in favor of the public (*jus publicum*). *Shively* v. *Bowlby*, 152 U.S. 1, 10–14 (1894). Indeed, the public right of navigation was so well entrenched that it survived even in Stuart times when the royal prerogative tended to swallow up most common privileges. We need only quote Sir Matthew Hale, Lord Chief Justice during the reign of Charles II (*De Jure Maris*, in Hargrave, *Tracts Relative to the Law of England*, Vol. 1, ch. III, at 8–9 (1787)):

> Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of

[5]The right of public navigation, however, dates at least from the Roman Empire. *Institutes of Justinian*, Bk. 2, Tit. 1, §2; see *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950).

the king's propriety, are public rivers *juris publici*.[6]

The common law of England on this subject was adopted in the colonies. Crown charters were deemed to convey title to the beds of navigable waters in public trust, subject to free use by the public for navigation and fishery. *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413, 414 (1842). Upon the American Revolution, all of the title and interest of the Crown in the beds of the sea and navigable waterways vested in the several states, subject, however, to the servitude for public navigation. *Shively* v. *Bowlby*, *supra*, 152 U.S. at 14–15; *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 229 (1845); *Martin* v. *Waddell*, *supra*, 41 U.S. (16 Pet.) at 414. And, of course, the same principle applies to later admitted states by virtue of equal-footing doctrine. See *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 228–229; *Mumford* v. *Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Weber* v. *Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65–66 (1873); *Knight* v. *U.S. Land Ass'n*, 142 U.S. 161, 183 (1891); *Shively* v. *Bowlby*, *supra*, 152 U.S. at 26; *United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377–378 (1977).

No doubt, the states have been free since the beginning to alter the common-law rule that governs ownership of river beds. *E.g.*, *Shively* v. *Bowlby*, *supra*, 152 U.S. at 14-15, 18–26; *Oregon* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 378. So, also, except as they relinquished the power, the states presumably might have abolished the public servitude of navigation, however venerable. The question, then, is whether there has been such a surrender with respect to the system of waterways that constitute the arteries of commerce and travel connecting the states — what came to be called the "navigable waters of the United States."

2. Even before the Constitution, the right to pass freely from state to state was secured to the people

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[6] Later in the same treatise (*id.*, ch. VI, at 36), the point is restated as a caveat to the proposition that a private individual may "have the propriety of a navigable river part of a port." This, says Sir Matthew, must be taken with the following "caution:"

> That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions, * * * [f]or the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.

Sir Mathew Hale treats the public right of fishing in tidal waters and arms of the sea very differently. According to him, the right of fishing "is originally lodged in the crown" (*id.* at ch. IV, at 11) and it may be reserved to the King, or granted out as an exclusive private right to an individual, or acquired by prescription (*id.*, ch. IV, at 11; ch. V, at 17, 18). The public right of navigation, by contrast, is not derived from the Crown but from "common law," is not susceptible of reservation or grant or appropriation, and it always takes precedence over fishing rights, public or private (*id.*, ch. I, at 6; ch. II, at 8; ch. V, at 21, 22). Although Hale's view that private fisheries in tidal waters could be acquired by royal grant after 1189 has since been repudiated (*e.g.*, *Attorney General for British Columbia* v. *Attorney General for Canada* [1914] A.C. 153, 169–171), English law continues to recognize private fisheries in tidal waters (*e.g. Malcomson* v. *O'Dea* (1863) 10 H.L. Cas. 593) while upholding the public's right "to pass up and down" the channels of navigable rivers (*e.g. Williams* v. *Wilcox* (1838), 8 Ad. & E. 314., 112 Eng. Rep. 857, 864).

of the confederacy. Articles of Confederation, Art. IV, 1 Stat. 4. A natural corollary is that the citizens of every state should have access to traditionally public highways and waterways for that purpose. Indeed, the Northwest Ordinance of 1787 expressly provided that "[t]he navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free," to citizens of the United States and inhabitants of the Territory alike. Sec. 14, Art. IV. This at least suggests that the public servitude of navigation was viewed as an aspect of the right to travel interstate.

In that event, it cannot be supposed that federal protection of the right was withdrawn when a "more perfect Union" was formed in 1789. Notwithstanding the omission of any express provision in the Constitution, the Court has characterized as "firmly established" the proposition that the "right of interstate travel is constitutionally protected * * * and is assertable against private as well as governmental interference." *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971). See also, *United States* v. *Guest*, 383 U.S. 745, 757–760 (1966); *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631 (1969). So here. But we need not pursue the point further. For, whether any other provision of the Constitution may be relevant, the right of navigation finds protection in the Commerce Clause.

It is, of course, long settled that navigation on the waters that connect the states to each other, or this Nation to others, is within the objects reached by the Commerce Clause. "All America understands," Chief Justice Marshall wrote in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824), "the word 'commerce,' to comprehend navigation. It was so understood * * * when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government* * *."

From the first, Congress acted under the Commerce Clause to preserve and to enhance public navigation. By the Act of August 7, 1789, ch. 8, 1 Stat. 50, it reenacted the Northwest Ordinance which, as we have seen, formally declared the navigable waters of the territory connecting with the Mississippi and the Saint Lawrence to be "common highways, forever free" to all Americans. And similar provisions were incorporated into laws establishing new territories and Enabling Acts admitting at least nine states. See Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 Land and Water L. Rev. 391, 416 n. 101 (1970).[7] As this Court later explained, these provisions announced no special rule for the states and territories involved. See *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 230; *Cardwell* v. *American Bridge Co.*, 113 U.S. 205, 211 (1885); *Hamilton* v. *Vicksburg, S. & Pac. R.R.*, 119 U.S. 280, 284–285 (1886); *Huse* v. *Glover*, 119 U.S. 543, 546-548 (1886); *Coyle* v. *Oklahoma*, 221 U.S. 559, 570-574 (1911). Rather, they expressly confirmed that navigable rivers should remain "highways equally open to all persons without preference to

[7]See, *e.g.*, 1 Stat. 491; 2 Stat. 235, 279, 642, 666, 703; 4 Stat. 290; 11 Stat. 166; 14 Stat. 421. See generally, *Economy Light Co.* v. *United States*, 256 U.S. 113, 118–120 (1921).

any"—not used "by private parties to the exclusion of the public"—and that there must be no "farming out of the privilege of navigating them to particular individuals, classes, or corporations." *Huse* v. *Glover*, *supra*, 119 U.S. at 547, 548. Accord, *Cardwell* v. *American Bridge Co.*, *supra*, 113 U.S. at 212; *Hamilton* v. *Vicksburg, S. & Pac. R.R.*, *supra*, 119 U.S. at 284-285; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 11-12 (1888).[8]

The Second Congress enacted the Enrollment and Licensing Act, ch. 1, 1 Stat. 287, 46 U.S.C. 11 *et seq.*, under which federally licensed vessels are entitled to engage in the coastwide trade in the navigable waters of any State. See *Gibbons* v. *Ogden*, *supra*; *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 272-282 (1977). And, in 1838, Congress passed a law prohibiting, without a federal permit, any commercial transportation by steamboat upon "the bays, lakes, rivers or other navigable waters of the United States." Act of July 7, 1838, ch. 191, Section 2, 5 Stat. 304.

Since at least 1816, moreover, Congress has appropriated billions of dollars in annual "rivers and harbors" acts for the improvement of harbors, rivers, creeks and lakes for navigation under the direction of the Secretary of War (now the Secretary of the Army). See 20 Op. Att'y Gen. 488, 498 (1892).

[8]Insofar as, contrary to our primary submission, the "forever free" clauses of the Enabling Acts do more than exemplify the public right of navigation already protected by the Commerce Clause, we would invoke the language of the Act applicable to Louisiana, 2 Stat. 701, and the decisions just cited as foreclosing the State from creating or implementing any supposed private right to exclude the public from any part of the navigable waters of the United States.

In 1890, Congress reported that "there is no money expended by the Government which is so much in the interest of the people as that expended in the improvement of the water-ways of the country." S. Rep. No. 1378, 51st Cong., 1st Sess. 3 (1890); H. R. Rep. No. 1488, 51st Cong., 1st Sess. 3 (1890). To protect the national investment in "river and harbor" improvements and to prevent the obstruction of the navigable waters, Congress prohibited, in a series of Acts culminating in the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, any bridges, dams, or other structures or work not authorized by the federal government which would impair the navigable capacity of the "navigable water of the United States."[9] By this legislation, "Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent." *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 708 (1899). And, since 1894, the Secretary of the Army (or the Secretary of War) has been authorized "to prescribe such regulations for the use, administration, and navigation

[9]Section 401 prohibits the construction of bridges, dams, dikes, or causeways over or in any port, roadstead, haven, harbor, navigable river or other navigable waters of the United States without federal consent. Section 403 prohibits any obstructions to the navigable capacity of any port, roadstead, haven, harbor, canal, navigable river or other navigable waters of the United States without the prior approval of the Corps of Engineers or Congress. Section 404 authorizes the Secretary of the Army to establish harbor lines beyond which no piers or other works may be constructed. Section 409 makes it unlawful to tie up or anchor vessels so as to prevent passage of other vessels and requires owners to remove sunken vessels. Section 414 authorizes the Secretary of the Army to remove sunken vessels from rivers, lakes, harbors, sounds, bays, canals or other navigable waters.

of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property * * * ." 33 U.S.C. 1; see 33 C.F.R. Part 207.[10]

It is unnecessary, for our purposes, to chronicle in further detail the vast amount of legislation filling Titles 33, 46 and 49 of the United States Code on the subject of navigation. What sufficiently emerges is that Congress has, since the earliest days of our nation, invoked its powers under the Commerce Clause to protect, improve and encourage the use of the navigable waters of the United States as "highways of commerce." To be sure, there is no general statute expressly bringing under federal protection the right of *all* people (and not only those holding a federal license to use *all* the navigable waters of the United States (and not only waterways in particular States), free from *all* impediments (and not only physical obstructions). But this merely reflects what has always been taken for granted: that the Commerce Clause itself recognizes the public right to navigate the national waterways and that the congressional role is not to reestablish the servitude but only to vindicate it against particular threats and to regulate its exercise in the public interest. All our legislation is founded on this premise.

3. The jurisprudence of this Court confirms this understanding. In *Gibbons* v. *Ogden*, *supra*, 22 U.S. (9 Wheat.) at 209, the Court came close to holding that

[10]Since 1972, the Coast Guard has also been authorized to issue such regulations for ports and waterways covered by the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, 33 U.S.C. 1221 *et seq.*, and 46 U.S.C. 391a.

the Commerce Clause, of its own force, deprived the states of the power to exclude interstate navigation. The Court avoided the issue by holding that the federal license precluded any state exclusion of the out-of-state vessel. *Id.* at 210-222. In later decisions, however, the Court firmly adopted the view that the navigable waters of the United States were impressed with a navigational servitude in favor of the public. Thus, in *Scranton* v. *Wheeler*, 179 U.S. 141, 160, 163 (1900), in the course of holding that the owner of the bed of a navigable stream was entitled to no compensation for a taking of his portion of the bed for a pier, the Court held that such land was subject to a superior federal servitude in favor of public navigation:

> The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. ***
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> * * * * *
>
> So that whether the title to the submerged lands of navigable waters is in the State or in the ripa-

rian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Because all navigable waters are "subordinate to the public right of navigation," *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62 (1913), and are "the public property of the nation," *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865), the Court has regularly held that no compensation need be paid to affected landowners for economic losses resulting from exercise of the government's regulatory power over navigable waters. Thus, no compensation need be paid for the loss in water power due to government impairment of the flow to a power company, *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 76; *United States* v. *Twin City*

Power Co., 350 U.S. 222, 226-227 (1956); nor the loss in water power due to the government's raising of the high water marks so as to reduce the head, *United States* v. *Willow River Co.*, 324 U.S. 499 (1945); nor for the loss of fishing and boating access to a navigable creek that is blocked as a result of federal improvement of another waterway, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); nor for the potential value of land as a port site when it is condemned for a lock and dam project, *United States* v. *Rands*, 389 U.S. 121, 123 (1967). Accord, *South Carolina* v. *Georgia*, 93 U.S. 4 (1876); *Eldridge* v. *Trezevant*, 160 U.S. 452 (1896); *Gibson* v. *United States*, 166 U.S. 269, 271 (1897); *United States* v. *Chicago, M., St. P. & Pac. R.R.*, 312 U.S. 592, 595-596 (1941).

Likewise, the government may order an owner of a bridge over a navigable water of the United States to remove or modify it in order to improve public navigation without paying compensation, for any bridge erected over such waters is subject to the paramount authority of the government to require its removal in the interest of navigation. *Union Bridge Co.* v. *United States*, 204 U.S. 364, 400 (1907); *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251, 258-264 (1915) (same; private wharf). And, although the public right of access to navigable waters of the United States may only be restricted by the national government, its existence also permits a state to make navigational improvements within the channel without compensating riparian owners for the loss of the water flow or for diminished access to a previously usable channel. *Transportation Co.* v. *Chicago*, 99 U.S. 635 (1878); *Manigault* v. *Springs*, 199 U.S. 473

(1905).[11] See also *Mobile* v. *Kimball*, 102 U.S. 691, 699 (1880); *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288, 295 (1887).

In short, under *federal* law, the notion that "the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 69. Title to the bed of navigable waters is "subject absolutely to the public right of navigation ***." *Lewis Blue Point Oyster Co.* v. *Bridge*, 229 U.S. 82, 87 (1913).

4. We have no occasion here to determine precisely how far the Commerce Clause of its own force, or federal legislation, preempts state regulation of navigation or navigable waterways. See, *e.g.*, *Douglas* v. *Seacoast Products, Inc.*, *supra*.[12] Much less need we

[11]The improvements at issue in these two decisions were made before a federal permit was required under the 1899 Act or its predecessors. Therefore, because the state improvements were made without any federal authorization and solely on the authority of the states, there was no affirmative exercise of the navigational servitude by the federal government. The navigational servitude, however, of its own force, precluded any private property interest in the streams and the Court held that the states were not required to pay compensation.

[12]And see *Mayor of New York* v. *Miln*, 36 U.S. (11 Pet.) 102 (1837) (vessel master may be required by local law to report names of landing passengers); *Cooley* v. *Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 316–318 (1851) (state may impose pilotage requirement); *Smith* v. *Maryland*, 59 U.S. (18 How.) 71 (1855) (state conservation law may limit fishing implements that may be used to take oysters); *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891) (same); *Packet Co.* v. *Catlettsburg*, 105 U.S. 559, 563 (1881) (city may erect wharf, collect a wharfing fee, and prohibit landings other than at wharf); *Cummings* v. *Chicago*, 188 U.S. 410 (1903) (federal permit to make river improvement does not suspend holder's obligation to obtain state permit); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (state may require vessels to use smoke abatement equipment); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 179–180 (1978) (state may require vessels to be escorted by tugs).

debate the correctness of those Nineteenth Century decisions that provoked the enactment of the Rivers and Harbors Acts of 1890 and 1899.[13] It is enough to notice that this Court has never condoned any attempt by state law to create a monopoly of navigation in any part of the national waterways. On the contrary, the Court has made clear that the Commerce Clause itself outlaws discriminatory rules that favor one group over another in the use of those waterways, even when the beneficiaries include all the citizens of the State. See *Douglas* v. *Seacoast Products, Inc.*, *supra*, 431 U.S. at 283–286. Cf. *Hughes v. Oklahoma*, No. 77–1439 (Apr. 24, 1977), slip op. 12–16. *A fortiori*, the Commerce Clause forbids a landowner from closing off for

[13]During the Nineteenth Century, a number of states authorized dams or bridges within their borders across navigable waters of the United States, thereby completely or partially blocking public navigation. The Court sustained such laws on the ground that, until Congress exercised its dormant power, the states were free to regulate commerce within their borders at least to the extent of authorizing dams and bridges which might, in the judgment of the states, best serve local commerce. *Willson* v. *Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (dam built to drain marsh); *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713 (1865) (non-drawbridge over Schuylkill River); *Pound* v. *Turck*, 95 U.S. 459 (1877) (dam); *Escanaba Co.* v. *Chicago*, 107 U.S. 678 (1882) (regulation of hours of day that drawbridge must be opened and closed); *Cardwell* v. *American Bridge Co.*, 113 U.S. 205 (1885) (non-drawbridge over American River); *Hamilton* v. *Vicksburg, S. & Pac. R.R.*, 119 U.S. 280 (1886) (state navigation improvements destroyed prior channel); *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288 (1887) (state navigation improvements destroyed prior channel); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888) (state drawbridge across Willamette River).

It may be questioned whether all of these decisions would survive today. Cf. *Hughes* v. *Oklahoma*, No. 77–1439 (Apr. 24, 1979). But, in any event, none of the cases sustains a monopoly of navigation in waters that are part of the national waterway system, much less permits the riparian landowner to reserve such waters to his own vessels.

his mere private benefit a part of the navigable waters of the United States, and likewise restrains the state from supporting such action.

It is hardly necessary to add that conditioning the right of navigation in national waters on the consent of riparian owners and the vagaries of state trespass laws would effectively destroy the public servitude. The waterways which physically interconnect the states form a continuous highway for navigation. The beds to these waterways may be vested in hundreds of private or public owners. Ownership of the bed of navigable waters may be bought and sold. It may even shift from owner to owner by virtue of the state law of avulsion, accretion and various state law exceptions thereto. *Oregon* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 367 & n.2. The difficulty in locating each owner, the cumulative burdens they might impose, and the ever-present risk of a "hold up" by a single owner would rob the highway of commerce of all of its utility.

Precisely these considerations led the Court to hold in *United States* v. *Causby*, 328 U.S. 256, 260-261 (1946), that the navigable airspace of the United States is a public highway, open to the aviating public, without the need to obtain the permission of the individual landowners whose land is crossed:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator

> to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim. [Footnote omitted.]

Thus, the Court held that land was impressed with a servitude in favor of aviation which might be exercised without any compensation to the owner of the land.

At issue in *Causby* was the Air Commerce Act of 1926, 49 U.S.C. 1304, 1508, which established "complete and exclusive national sovereignty in the air space" over this country and recognized in every citizen "a public right of freedom of transit in air commerce" through the "navigable air space of the United States." Significantly, Congress patterned the legislation on the navigational servitude:

> [T]he legal features of the bill have their foundation in existing principles of law. * * * The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable or nonnavigable waters. *The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil.*

> The whole framework and, in many cases, the very language of the bill may fairly be said to be merely the application to air transportation of provisions of statutes and principles of law long established as to water transportation.

H.R. Rep. No. 572, 69th Cong., 1st Sess. 10 (1926) (emphasis added).[14]

In sum, the universal assumption has been that the navigable waters of the United States are open for public navigation and that no one may appropriate to private ownership the right to navigate such waters, whatever state law may provide. This public servitude, always part of the common law, has been recognized from the earliest days of the nation. For a century and a half, it has been the *raison d'etre* of annual congressional appropriations to improve the navigability of countless creeks and streams throughout the country. It has been the basis for federal legislation prohibiting obstruction to navigable waters of the United States. It was invoked when Congress was "recognizing and declaring" an analogous navigational servitude in the airspace of the United States. It is an ancient right, protected by the Commerce Clause of the Constitution. In this respect, our fundamental charter carries forward the promise of Magna Carta:

[14] *Causby* and the Air Commerce Act are not distinguishable because the right of access was "recognized and declared" by statute. If the Commerce Clause of its own force did not impress the servitude on private lands, then the states would be free to create private property rights in such airspace and Congress, though it could "take" such airspace by statute, would nonetheless be required to pay compensation. *Causby* holds that no compensation need be paid for use of the airspace notwithstanding any state-created property interests. This necessarily holds as well that the Commerce Clause, of its own force, precluded such interests.

Just as in England neither King nor lesser Lord could prevent navigation of public rivers, so here, the liberty of passing over the navigable waters of the United States belongs to all the people, from whom it can be taken, if at all, only by authority of the nation itself.

II. RESPONDENT'S CANAL SYSTEM IS A PART OF THE NAVIGABLE WATERS OF THE UNITED STATES

In the preceding pages, we have sought to demonstrate that, absent federal regulation modifying the rule in particular instances, the public servitude of navigation applies to all the "navigable waters of the United States." It only remains to show that respondent's canal system fits that description.

1. The canal system satisfies every traditional definition of a navigable water of the United States. From the beginning, the admirality and maritime jurisdiction of the federal courts—which was established to resolve navigational or maritime disputes arising on the navigable waters of the United States—has comprehended all waters which ebbed and flowed with the tide. *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). That test is met here (Pet. App. A-8).

Nor is that all. As we have seen (*supra*, page 11), even in England there were "fresh" rivers that did not "flow and reflow" and nevertheless were deemed "common highways for man or goods or both." All the more so in this country, with its extensive waterways which are not subject to the tide. Thus, in *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 454-456 (1851), admiralty and maritime jurisdiction was ex-

tended to all waters navigable in fact. Here, too, respondent's canals fully satisfy the criterion, being some sixty feet wide and eight feet deep (Pet. App. A-8).

The "navigable waters of the United States," as opposed to state navigable waters, are those which form "by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *Gilman* v. *Philadelphia*, *supra*, 70 U.S. (3 Wall.) at 724; *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 63; *United States* v. *Chicago, M., St. P. & Pac. R.R.*, 312 U.S. 592, 595-596 (1941). It does not matter that the river in question lies wholly within a single state. Every navigable waterway that connects with the waters leading to other states is navigable water of the United States. *The Daniel Ball*, *supra*, 77 U.S. (10 Wall.) at 563-564. Once again, the canal system in suit meets the test. It is in fact used to support commerce (oil exploration, fishing, hunting) (Pet. App. A-8), and it leads into the Gulf and the Intercoastal Waterway (*ibid.*).

This would be the end of the case except for the claim that the public servitude is inapplicable because the canals were built on private land at the expense of the landowner. We turn to that argument.

2. With unaccustomed tentativeness, and without the usual citation of precedent, Sir Matthew Hale wrote that when a man "at his own charge makes his own private stream to be passable for boats or barges"—without blocking the original waterway or obtaining a charter to collect tolls—it "seems" he may reserve the water "to his own private use." *De Jure*

Maris, *supra*, ch. III, at 9. This dictum has been followed uncritically by some commentators. *E.g.*, J. Gould, *Waters* 209 n.5 (3d ed. 1900). But every indication is that Hale's opinion did not accurately represent the common law on this point—any more than when he asserted the continuing prerogative of the Crown to create several fisheries in tidal water. See note 6, *supra*. Indeed, the only reported English decisions we have uncovered appear to look the other way. See *Case* v. *The Midland Railway Company*, 27 Beavan 247 (1859); *Simpson* v. *Attorney-General*, [1904] A.C. 476.[15] See also, H. Coulson & U. Forbes, *The Law Relating to Waters* 340, 344 (ed ed. 1910).[16]

At all events, in this particular we cannot be bound by rules developed for the very different requirements of a relatively small island whose navigable waterways are largely tidal. As already noted, this nation early abandoned a definition of navigability that rested in large measure on the influx of the sea. Our own rule is that navigable—and therefore public—waterways include those as to which "artificial aids" are needed to "make the highway suitable for use before commercial

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[15]In this case the House divided (3 to 2) on the question whether the owner of locks was required to repair them and render his system navigable once more. Although the Lords of Appeal in the majority answered in the negative, the court was unanimous in concluding that, while operating, the lock system must be open to all. *E.g.*, [1904] A.C. at 482-483 (Lord Macnaghten, joined by Lord Robertson and Lord James), 501 (Lord Davey), 513 (Lord Lindley).

[16]Not surprisingly, the question seldom arose. For the most part, in England as in this country, most private undertakings were canals constructed for the purpose of admitting the public on payment of a toll and authorized by special charter which required the channel to be kept open.

navigation may be undertaken." *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 407 (1940). And by explicit command of statute, private improvement of such potentially navigable waterways opens them to toll-free passage. 33 U.S.C. 565.[17]

Our case, it will be said, is different in that the canals in suit did not "improve" an existing channel, but created a new waterway where no stream of any kind existed before. That is a somewhat artificial characterization. The critical fact is that respondent's canal system is connected to pre-existing arteries of interstate commerce and is, therefore, an integral part of those waterways. The bed may be new, but the water that flows in respondent's canals comes from the Gulf or the Intercoastal Waterway and creates new arms to those commercial highways. For the purpose of the public right of navigation, it cannot matter whether the new works that extend the navigable stretch of an interstate waterway follow an old formerly impassable channel or cut through virgin soil. See *United States Geophysical Company* v. *Vela*, 231 F.2d 816, 821 (5th Cir. 1956).

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[17]The cited provision, enacted as part of the Rivers and Harbors Act of 1902, ch. 1079, Section 1, 32 Stat. 371, reads as follows (emphasis added):

> Any person or persons, corporations, municipal or private, who desire to improve any navigable river, or any part thereof, at their or its own expense and risk may do so upon the approval of the plans and specifications of said proposed improvement by the Secretary of War and Chief of Engineers of the Army. The plan of said improvement must conform with the general plan of the Government improvements, *must not impede navigation, and no toll shall be imposed on account thereof*, and said improvement shall at all times be under the control and supervision of the Secretary of War and Chief of Engineers.

What is more, cutting a new channel off an existing waterway must often deflect the flow in such a way as adversely to affect an older bed, which may silt up or be deprived of sufficient water to support navigation. Indeed, that is the unchallenged fact in this case. In those circumstances, it is generally agreed that the substitute channel—whether natural or artificial—must be made to bear the public navigational servitude. See, *e.g.*, Hale, *De Jure Maris*, *supra*, at ch. III, at 10; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 634-635 (1912); *Dwinel* v. *Barnard*, 28 Me. 554, 562 (1848). Yet, after the passage of time, it must often be impossible accurately to reconstruct the sequence of events and to identify cause and effect.

To permit the "artificial" or "natural" character of additions to the navigable waters of the United States to determine whether they shall be "private" or "public" would reintroduce the very evil that the navigational servitude is designed to avoid and would impose an intolerable and unworkable burden on navigation. It is not always easy to tell whether a waterway is artificial, natural, or partly both. A canal might be built over a stream. Years afterwards, it will be difficult to determine whether the original stream was navigable or could be made so with reasonable improvements. At all events, the navigating public cannot be expected to know whether the opening to navigable channels is "natural" or "man-made," and, if the latter, whether the channel replaced a pre-existing navigable waterway. No doubt, signs posted by the landowner could identify private canals, albeit only at the last moment. But it does not seem satisfactory to rely on a landowner who has every incentive to resolve any factual

ambiguity in his favor and thereby appropriate for his private use what in fact belongs to the public.[18]

[18] Although it was not always so viewed, respondent's canal system plainly is a navigable water of the United States under the current definition used by the Corps of Engineers. 33 C.F.R. Part 329 (reproduced in the Appendix).

The first record of respondent's canal system in the files of the District Engineer in New Orleans appeared in 1942. On May 15, 1942, the Corps of Engineers issued a permit pursuant to 33 U.S.C. 403 authorizing Humble Oil Company (now Exxon Corporation), respondent's lessor, to dredge canals connecting with certain navigable waters of the United States in the area in question. Condition (e) of the permit provided that "no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure." The plans and specifications approved by the Corps show proposed canals connecting with and, in some instances, replacing pre-existing natural waterways. After the work approved by the 1942 permit was completed, Humble (or Exxon) advised the Corps from time to time that it desired to dredge additional canals to connect with the initial canal but not to intersect natural waterways. The Corps responded with "letters of no objection" for such work. During this period the Corps did not require a permit to dredge an artificial canal on private land which only connected with another privately constructed canal. In 1972, however, the Corps revised its definition of "navigable waters of the United States" to include artificial canals which connected only with other canals. See 33 C.F.R. 209.260(g)(1) (1973). Since January 1974, the Corps has required Exxon Corporation to obtain a permit to dredge new canals even though the canals connect only to its other canals and not to any natural waterways. These permits have included conditions of public access similar to condition (e) in the 1942 permit. The Corps' most recent regulations, moreover, contain a "nationwide" permit approving work such as that performed pursuant to the "letters of no objection." 33 C.F.R. 322.4(g) approves all "[s]tructures of work completed before 18 December 1968 or in waterbodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation." Thus, all of respondent's canal system is now subject to the condition that there be no interference with navigation or any attempt to forbid full and free use by the public of all navigable waters at or adjacent to the canals.

3. Nor are we persuaded by the suggestion that the public right of navigation must give way in order to provide an incentive to the useful work of landowners who construct a canal or other waterway on their property at their own expense. Cf. *Veazie* v. *Moor*, 55 U.S. (14 How.) 567, 574 (1852). When the new channel is connected to an artery of interstate commerce—the only case that concerns us—the owner is himself deriving a substantial benefit. He is using, and sometimes distorting, the flow of the public waterway and is gaining a special access, which is presumably what motivates the undertaking. If the landowner is allowed to reserve the canal he has created exclusively to his own uses, it is not evident that any public interest is served. It is a small price that he should be required to concede a public right of passage over the extension of the existing navigable waterway. This, as we have noticed, is the statutory rule when the landowner undertakes to improve a potentially navigable channel. It is not apparent why a different result should obtain because the work involves a new channel equally connected to the national system of waterways.

There will be exceptional cases in which it is appropriate to exclude the public from a discrete body of water. But such instances are provided for by federal law and require no intervention of state authorities or resort to self-help. Thus, 33 U.S.C. 1 provides that the Secretary of the Army "shall prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property." Pursuant to this authority, the Secretary has restricted access to a number of navigable waters in or near military facilities. He has

also issued numerous regulations for the use of specific canals, locks and other facilities, including safety regulations. See generally 33 C.F.R. Part 207.

What additional special circumstances might justify a qualification or suspension of the public navigational servitude, it is unnecessary to explore. It is enough to notice that the Secretary has authority to restrict access to particular canals or artificial improvements which, in his judgment, merit special protection, but that no such restriction has been condoned in the case of respondent's canals.[19] If relief is necessary, that is the procedure to be followed. Our constitutional scheme places the navigable waters of the United States, and the public servitude which attaches to them, in the care of the nation. It is not for the State of Louisiana to purport to carve out exceptions.

[19] See note 18, *supra*. In exercising his authority under 33 U.S.C. 1, as well as other statutory provisions, the Secretary proceeds from the premise that the public has a right to navigate all navigable waters of the United States until such time as he restricts access. The Secretary has never issued any nationwide regulation affirmatively authorizing passage on all navigable waters of the United States. As mentioned, such a right of passage has always been taken for granted. The Secretary has, however, issued regulations which restrict passage on certain navigable waters of the United States. See generally 33 C.F.R. Part 207. Under these circumstances, the failure of the Secretary to issue a regulation restricting public navigation on a particular navigable water of the United States is tantamount to regulation that there should be no restriction on the public right of navigation on the waterway. Any contrary state rule must yield to the superior federal rule. See *Ray* v. *Atlantic Richfield Co.*, 425 U.S. 151, 178 (1978).

CONCLUSION

The judgment of the Louisiana Court of Appeals, Third Circuit, should be reversed, and the actions against the petitioners dismissed.

Respectfully submitted.

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APPENDIX

CORPS OF ENGINEERS' DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES (29 C.F.R. PART 329)

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters."

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers Districts and Divisions having Civil Works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters" or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by the Federal Courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide

and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in subparagraph (a) above; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of Commerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 below, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long

as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same State. It is only necessary that goods may be brought from, or eventually be destined to go to, another State. (For purposes of this regulation, the term "interstate commerce hereinafter includes "foreign commmerce" as well.)

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§ 329.8 ~~Intrastate or interstate nature of waterway.~~ Improved or Natural Conditions of the Waterway.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.*(1) An artificial channel may often constitute a navigable water of the United States, even though it has been

privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area. (See § 329.12(b).)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvements need not exist, be planned, nor even authorized; it is enough that potentially they could be

made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvements; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) above) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are nonnavigable, or

have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" for commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

* * * * *

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners

v.

VERMILION CORPORATION,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 77 - 1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND
LARRY J. BROUSSARD,
Petitioners.

v.

VERMILION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FOR THE THIRD CIRCUIT
OF THE STATE OF LOUISIANA

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

I.

QUESTION PRESENTED

Does regulatory power under the Commerce Clause override the 5th Amendment's prohibition against taking property without compensation and thereby provide a public right of access to and use of private waterways built with private funds for private purposes on private property ?

II.

INTEREST OF AMICUS CURIAE

Presented to this Court for review as a matter of federal

law is the holding of Louisiana's Third Circuit Court of Appeal that a canal on private property constructed and maintained with private funds for private purposes is a private canal subject to private control and that the public has no right of use of the surface waters thereof even though the canal is navigable and enters other naturally navigable waterways. In rejecting Petitioners' claim of public access and holding as a matter of Louisiana law that the artificially constructed canal was not subject to a right of public use, the Third Circuit observed that since neither the Rivers and Harbors Act (33 U.S.C. § 401, et seq., herein the "RHA") nor federal common law granted individuals the unrestricted right to use a privately owned natural waterway made navigable with private funds, then *a fortiori*, the public has no right to use an artificial navigable waterway constructed with private funds. The Louisiana Appellate Court cited *United States v. Kaiser Aetna*, 408 F.Supp. 42 (D.C. Haw. 1976) in support of its conclusion that federal law did not afford the public a right of access to the canal.

Subsequent to the Louisiana Third Circuit's decision, the United States Court of Appeals for the Ninth Circuit reversed in part the District Court in *United States v. Kaiser Aetna*, by holding that federal regulatory jurisdiction under the RHA does extend to a privately owned natural waterway which is made navigable with private funds, and that a public right of use of such waterway is inseparable from federal regulatory jurisdiction under the RHA. *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir. 1977) writ granted, #78-738, U.S. Sup. Ct.

Louisiana Landowners Association, Inc. (the "Association") is a nonprofit corporation composed of 500 members who organized for the purpose of the protection and advancement of the rights of private property owners. There are numerous private waterways situated on property owned by members of the Association. Many of these waterways, including artificial canals, were constructed to provide access for mineral and timber operations, and for drainage, irrigation, reclamation, trapping and recreation activities. They were constructed and are used only with the permission and authorization of the landowner. Such waterways have historically been treated under Louisiana law as the private property of the individual landowners on whose property they are located, subject to such landowner's exclusive regulation of its use. Thus, the Association will be directly affected by the decision of this honorable Court on the issue of unrestricted public access to and use of such waterways.

Additionally, this Court's decision will affect many trappers whose income is derived from trapping operations conducted on the private property through which many such waterways have been cut. Such areas, which are usually marsh and swamp lands, harbor abundant wildlife, including waterfowl, fish, reptiles, commercial furbearing animals and other quadrupeds. Trapping commercial furbearing animals is and has been a source of livelihood for many people who have dwelled for generations on or near the property traversed by such waterways.[1] These people secure trapping rights from the property owners, usually in the form of a trapping lease, which customarily is granted for a nominal consideration.

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1. In 1978, over 12,000 trapping licenses were issued by the State of Louisiana. In 1977-78, trappers took over 3,690,000 pounds of commercial furbearing animal meat and 3,700,000 pelts, with a combined value of $13,300,000 (which was down from $24,700,000 in 1976-77). Statistics from Louisiana's Department of Wildlife and Fisheries.

The real benefit to the landowner is not the small amount of money paid by the trapping lessee; it is the trapper's possession of the landowner's property which prevents loss of title through adverse possession of others. Adverse possession is often a real problem because of the remoteness and inaccessibility of the property, which often has very few natural monuments for property lines. A trapper, however, knows his leasehold and its boundaries; and he protects his leasehold from trespassing poachers because they threaten the livelihood of himself and his family. Moreover, trappers also serve a useful conservation function by protecting the environment and by preserving other forms of wildlife from indiscriminate depletion.

If this honorable Court were to hold that private waterways, located on private property and constructed and maintained with private funds for private purposes, are subject to public access and use, the effect on the trapping industry could be devastating. It would be virtually impossible to prevent indiscriminate trespassing and poaching, with their concomitant deleterious effect on the marsh and swamp ecosystems. Since many members of the Association have granted trapping leases affecting their property, the decision of this honorable Court in this cause is of great interest to the Association for that additional reason.

III.

ARGUMENT

A.

The Exercise of Powers Derived From the Commerce Clause is Limited by the 5th Amendment

Petitioners assert that the Commerce Clause of the United

States Constitution grants a public right of access to, and use of, private property, e.g. the private waterway which is the subject of the instant litigation, without any compensation to the owner thereof. In support of their interpretation of the Commerce Clause, petitioners refer to the so-called navigation servitude doctrine, which is a jurisprudential expression of the regulatory power of the United States derived from the Commerce Clause to protect and preserve navigation upon navigable waters of the United States. *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967).

Initially, it must be recognized that the issue before this Court is not whether private waterways are subject to federal regulation; the issue is whether the Constitution or any other statutory law of the United States appropriates such private property or rights therein for public use, without compensation to the owner. This issue is strictly one of federal law, inasmuch as the private canal *sub judice*, as a matter of Louisiana law, is private property to which there is no vested right of public access or use. *Harvey v. Potter*, 19 La. Ann. 264 (1867) and *National Audubon Society v. White*, 302 So.2d 660 (La. App. 3 Cir., 1974). Louisiana's law in that respect is consistent with the general rules of property law prevailing in the United States.

> "Private canals built on private property are subject to the control of their owners the same as any other private property; the use of such canals being merely permissive, the public acquires no vested rights therein but must use them subject to such rule as the owner sees fit to impose." 12 Corpus Juris Secundum, "Canals", §31, at p. 919.

Although the Commerce Clause (art. 1, § 8, cl. 3) of the Constitution grants to the United States the power to *regulate* commerce between the states and comprehends the control of "all navigable waters of the United States" *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25, 18 L.Ed. 96, 99 (1866), nevertheless that power is limited by the 5th Amendment to the Constitution which guarantees that no person shall be deprived of property without due process of law and just compensation. "Confiscation may result from a taking of the use of property without compensation quite as well as from taking of the title." *Chicago R. I. & P.R. Co. v. United States*, 284 U.S. 80, 96, 76 L.Ed. 177, 186 (1931); cf. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 53 L.Ed. 1024 (1909). While public access to and use of navigable waters of the United States is derived from regulatory powers conferred by the Commerce Clause, in exercising that power, Congress must assure that private property rights protected by the 5th Amendment are not abridged:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.
>
> * * *
>
> "All the cases concur in holding that the power of Congress to regulate commerce, and therefore

> navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all." *Scranton v. Wheeler*, 179 U.S. 141, 153-154, 162, 45 L.Ed. 126, 133-134, 137 (1900). See also *Monongahela Navigation Company v. United States*, 148 U.S. 312, 37 L.Ed. 463 (1893).

Petitioners assert that the navigation servitude doctrine permits confiscation of private property rights in and to private waterways without compensation in the interest of public access to the same under the Commerce Clause. A brief examination of the origin and application of the navigation servitude doctrine will point up Petitioners' misapprehension of the Constitutional constraints upon powers derived under the Commerce Clause and the application of the navigation servitude where private property rights are taken as a consequence of its exercise.

B.

The Navigation Servitude is Limited by the 5th Amendment

The power to regulate commerce under the Commerce Clause confers upon the United States a "dominant servitude" over the bed and flow of "navigable waters of the United States" to aid navigation thereon and thereover. *United States v. Kansas City Insurance Co.*, 399 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967); cf. *United States v. Doughton*, 62 F.2d 936 (4th Cir. 1933). When the navigation servitude

is lawfully exercised by the United States, no compensation for damage to, or deprivation of, private property rights is required because they are subordinate to the United States' power to protect and preserve navigable waters of the United States as public highways of interstate commerce. *United States v. Kansas City Life Insurance Co.*, 399 U.S. 799; *United States v. Chicago M. St. P. & P. R. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913).

Because the application of the servitude may result in a deprivation of private property rights, this honorable Court early on mandated that it should never be exercised in a Constitutional vacuum; the limitations imposed by the 5th Amendment on any exercise of power derived from the Commerce Clause must always be observed:

> "The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give affect to that right, is so fully established, and is so amply illustrated by recent decisions of this court that a mere reference to the case will suffice * * * (Citations omitted).
>
> "(T)his rule, like every other, has its limits, and in the present case, which require us to ascertain the dividing line between public and private right, it is important to inquire what are 'navigable streams' within the meaning of the rule". . . . *United States v. Cress*, 243 U.S. 316, 320-321, 61 L.Ed. 746, 750 (1917).[2]

See also *Monongahela Navigation Company v. United States*, 148 U.S. 312, 37 L.Ed. 463 (1893); *United States v. Rands*, 389 U.S. 121. In *Monongahela Navigation Company*, this Court states:

> "Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation." 148 U.S. at 336, 37 L.Ed.at 471.

C.

The 5th Amendment Precludes Application of the Navigation Servitude to Private Waterways

The Daniel Ball established the test of navigability of rivers and streams which constituted "navigable waters of the United States" for purposes of admiralty jurisdiction and regulatory jurisdiction under various acts of Congress as those waterways which are, in their ordinary condition, navigable in fact and form part of a continuous navigable highway of commerce between the states. *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563, 19 L.Ed. 999, 1001 (1870).

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2. This Court later limited its holding in the *Cress* case to the facts there disclosed in the decision of *United States v. Chicago, M. St. P. & P. R. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941). That limitation, however, was not directed to the 5th Amendment constraints on the exercise of the navigation servitude.

The Daniel Ball's test of navigability was modified in *The Montello*, 87 U.S. (20 Wall) 430, 22 L.Ed. 391 (1874), holding a once navigable in fact river did not lose its navigable character by reason of artificial obstructions; in *Economy Light and Power Company v. United States*, 265 U.S. 113, 65 L.Ed. 847 (1921), holding that a water body remains navigable for regulatory purposes even though it subsequently may become non-navigable because of a change in conditions or the presence of artificial constructions; and in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940) holding non-navigable waterways which could be made available for commercial interstate navigation with "reasonable improvements" to be navigable waters of the United States.

All of these cases concerned rivers and streams wholly or in substantial part navigable in their *natural* conditions, not waterways artificially created on private property; and it can hardly be argued that cutting a waterway through dry land is a "reasonable improvement" of an existing natural waterway contemplated by this honorable Court in announcing its decision in *Appalachian*.

In *United States v. Cress*, 243 U.S. 316, 61 L.Ed.746 (1917), this Court followed *The Daniel Ball* concept of navigability in speaking of those water bodies to which the navigation servitude attached, but recognized this distinction that such rivers and streams must also be navigable in their *natural* condition:

> "That the test of navigability in fact should be applied to streams in their natural condition was in effect held in The Daniel Ball, 10 Wall 577, 19 L. Ed. 999. . . .

> "It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interest of navigation is a natural servitude, confined to such steams as, in their ordinary and natural conditions, are navigable in fact and confined to the natural condition of the stream." *United States v. Cress*, 243 U.S. at 323-326, 61 L.Ed. at 751-752.

The *Cress* requirement of natural navigability has been adhered to in subsequent cases involving judicial recognition of the application of the navigation servitude where private property rights were taken or used as a consequence of its application. Representative of such recognition are: *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 F.680 (6th Cir. 1898); *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906); *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579 (Ct. Cl. 1975); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F.Supp. 852 (Ct. Cl. 1949); cf. *Utah v. United States*, 403 U.S. 9, 29 L.Ed. 2d 279 (1971); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978); and *Leovy v. United States*, 177 U.S. 621, 44 L.Ed. 914 (1900). In *Harrison v. Fite*, the Court stated:

> "To meet the test of navigability as understood in the American law a water course should be . . . of practical usefulness to the public as a public highway in *its natural state and without the aid of artificial means.*" 148 F. At p. 783 (Emphasis added)

Although this Court did not amplify upon its limitation of the servitude to rivers and streams in their *natural* condition in *Cress*, or in any of its subsequent decisions adhering to the requirement, the *ratio decidendi* of the limitation

seems apparent. One who takes title to the bed and/or banks of a river or stream which is navigable under *The Daniel Ball* test of navigability in *its natural condition* acquires that title subject to all advantages and disadvantages of riparian ownership, including impressment of the navigation servitude as an inchoate lien or charge on the bed, banks and surface water. Thus, the reason the 5th Amendment requires no compensation when riparian property rights in and to the bed and bank of a river or stream navigable in its natural condition are taken is because the riparian owner's title there is imperfect; this removes the 5th Amendment constraints from any taking of such riparian rights pursuant to an exercise of the navigation servitude. *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950). *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir., 1931). However, where a waterway is artificially created by construction through fast lands it obviously is not navigable in its natural condition and ownership thereof is perfect. While it may be subject to regulation, private property rights therein cannot be taken without compensation.

Analagous to this discussion of the dichotomy between private artificial waterways and rivers and streams navigable in their natural condition are the private property rights recognized with respect to toll canals. While riparian owners along rivers and streams navigable in their natural condition cannot restrict public access to such waters since they constitute waters of the United States, owners of private canals may restrict public access to the same by requiring payment of tolls for the use thereof.[3] Those toll waters obviously are

3. *Harvey v. Potter*, 19 La. Ann. 264 (1867), *Perrine v. The Chesapeake & Delaware Canal Co.*, 50 U.S. (9 How. 172, 13 L.Ed. 92 (1850).

not subject to a navigation servitude, otherwise tolls could not be charged by the owners and operators thereof.[4]

D.

The Navigation Servitude and Regulatory Jurisdiction are Separable Concepts Because of the 5th Amendment Limitation on the Commerce Clause

The term "navigable waters of the United States has been variously defined depending upon its legal appreciation. For example, regulatory jurisdiction under the RHA has been said to extend to waters which are navigable in fact under *The Daniel Ball* standard;[5] to waters which in some areas are non-navigable in their natural and ordinary condition, but which can be made navigable in those areas with reasonable

4. See 36 Op. U.S. Atty. Gen. 203, (1930) where in denying a right to take over privately owned and constructed portions of a toll canal which formed a part of a waterway owned by the State of Illinois: ". . .Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner and deprive the latter of any investment upon it." at p. 214.

5. See *Egan v. Hart*, 168 U.S. 189, 41 L.Ed. 680 (1897); *Utah v. United States*, 403 U.S. 9, 29 L.Ed. 2d 279 (1971); *North American Dredging Co. of Nevada v. Mintzer*, 245 F.297 (9th Cir. 1917); *Gulf Interstate Ry. Co. of Texas v. Davis*, 26 F.2d 930 (S.D. Tex., 1928); *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974); *United States v. Ross*, 74 F.Supp. 6 (D.C. Mo. 1947); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F.Supp. 852 (Ct. Cl. 1949); *Pitship Duck Club v. Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978).

improvements;[6] and to certain artificial waterways which are actually used in interstate commercial activities.[7] Additionally, and perhaps most noteworthy is the scope of ecological regulatory jurisdiction over navigable waters of the United States conferred under the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1311, et seq.). The term "navigable waters of the United States" has been construed thereunder to include any waterbody, regardless of how shallow and how remote its interstate connexity may be, if activities therein have an impact on the environment, because "Congress clearly meant to extend the Act's jurisdiction to the constitutional limit. . .". *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 48 L.Ed. 2d 578 (1976); *Weismann v. Dist. Eng. U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *State of Wyoming v. Hoffman*, 437 F.Supp 114 (D. Wo. 1977). See also *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978), and cases cited therein.

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6. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940).

7. *Dow Chemical Company v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972) cert. denied, 409 U.S. 1040 (1972). In holding the artificial canal subject to RHA regulatory jurisdiction, the Fifth Circuit relied primarily on three cases concerned with the extent of Admiralty jurisdiction. See *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953); *Dagger v. U.S.N.S. Sands*, 287 F.Supp. 939 (D.W. Va. 1968); *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F.Supp. 909 (E.D. La. 1963). These cases are questionable as analogous RHA authorities since RHA jurisdiction is underpinned by the waterway being a public highway of interstate commerce; it is not made so because the owner uses it as access to navigable waters of the United States for carriage of his own goods any more than using a private driveway for access to public highways by motor vehicle traffic can be said to grant public access to the driveway.

The 5th Amendment constitutional constraints upon the application of the navigation servitude render it much more limited in scope than the full regulatory power of Congress under the Commerce Clause. *United States v. Kansas City Life Insurance Company*, 339 U.S. 799, 94 L.Ed. 1277 (1950). Unfortunately, this limitation on the application of the doctrine has not always been carefully observed in decisions construing the scope of regulatory jurisdiction derived from the Commerce Clause over waters of the United States.

Lower courts, apparently commencing with the decision of *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied 401 U.S. 910 (1971), began speaking of ecological regulatory jurisdiction under the Commerce Clause and the navigation servitude as if the two concepts were synonymous.[8] *Zabel v. Tabb* was a dredge and fill permit case in which the court held regulatory jurisdiction extended to all areas within the reach of the ebb and flow of the tide, even though those areas were not navigable in fact, nor could they become navigable with reasonable improvements, because they were subject to "the paramount servitude in the Federal government," 430 F.2d at p. 215. This decision is the first apparent application of the navigation servitude to regulate private activities

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8. See also *United States v. Stoeco Homes Inc.*, 498 F.2d 597 (3rd Cir. 1974) cert. denied 420 U.S. 927 (1974); *United States v. Cannon*, 363 F.Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F.Supp. 1132 (S.D. Ga. 1973). Prior to the decision of *Zabel v. Tabb*, the Corps of Engineers defined "navigable waters" as waters which were navigable in fact or potentially navigable with reasonable improvements. 33 C.F.R. § 209.260 (1971). Reacting to this decision and others subsequent to it, the Corps redefined its regulatory jurisdiction to include non-navigable in fact fringe areas of waters navigable in fact, i.e., to the point of ordinary high water on banks of rivers, and to the point of mean high water on shores of tidal water bodies. See 33 C.F.R. § 329, et seq. (1978).

for purposes other than to aid navigation.

While the ecological result may be correct and cause no Constitutional trauma per se because private property rights were not taken or destroyed, but only regulated, and the Commerce Clause may afford jurisdiction to the full constitutional limit to protect the environment, the equation of the navigation servitude to regulatory jurisdiction under the broadest Commerce Clause application contravenes the purpose of the servitude, which is *only* to aid navigation. *United States v. Kansas City of Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950). However, once the servitude is said to attach to a waterway, the concomitant is that private property rights can be taken without compensation. Moreover, predicating the attachment solely on ecological regulatory jurisdictional grounds without considering the potential affect on private property rights manifests the Constitutional confrontation between the 5th Amendment and the Commerce Clause caused by indiscriminate application of the servitude doctrine within the realm of regulatory jurisdiction without careful analysis of the purpose for which it is invoked.[9] And it is that Constitutional confrontation which absolutely precludes a blanket indictment of property rights

9. The navigation servitude, when it lawfully attaches to a navigable water of the United States, not only affords a right of public access to surface waters, but also permits the taking, use, dredging or flooding of the bed up to the point of ordinary high water on river banks (or mean high tide on the shore in tidal areas), all without compensation to property owners. If, as a result of such taking, improvements are destroyed or rights of access to the waterway are lost, no compensation is required, even when the livelihood of the riparian owners may be destroyed. See *United States v. Rio Grande Dam & Ins. Co.*, 174 U.S. 690, 436 L.Ed. 1136 (1899); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913); *United States v. Chicago M., St. P.P. & R.R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed. 2d 329 (1967).

under the premise that the navigation servitude and regulatory jurisdiction over waters of the United States, however defined and applied, are inseparable.[11] This, of course, is not to suggest that regulatory jurisdiction and the servitude cannot both attach simultaneously to certain water bodies; they can and do, but only where the water body is navigable in fact in its *natural* condition, and where it forms a continuous highway of interstate commerce.[12] Anything short of that will not Constitutionally sustain the servitude even though some other form of regulatory jurisdiction may Constitutionally subsist.

CONCLUSION

Private property rights have become obscured in a regulatory cloud. A private artificial water body, constructed with

11. The private waterway which is the subject of this suit may in fact be subject to regulatory jurisdiction of some kind or description. However, that certainly does not mean that the navigation servitude is inseparable from that jurisdiction. It is respectfully submitted that the holding of the Ninth Circuit Court of Appeal in that regard in *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir. 1978) (cert. granted #78-738 on the Docket of this honorable Court) which is predicated solely on ecological jurisdictional cases defining waters of the United States under the Federal Water Pollution Control Act Amendments of 1972 (33 USC 1311 et seq.) is erroneous and should be reversed.

12. As an incident of power derived under the Commerce Clause, Congress legislated that all "navigable waters" within Territories of Louisiana and Orleans are public highways. Act of Feb. 15, 1811, Ch. 14, Sec. 12 (33 USC §10); see also Act of April 8, 1812, Ch. 50 Sec. 1, 2 Stat 701 declaring the Mississippi River and all navigable waters flowing into the same and the Gulf of Mexico to be public highways. These Acts, if they are to strike the necessary Constitutional balance between the 5th Amendment and the Commerce Clause, must be held to be limited by *The Daniel Ball* standard of navigability, eg. navigable in fact in their ordinary conditions and highways of interstate commerce, or they are unconstitutional under the mandates of *Scranton v. Wheeler*, 179 U.S. 141; *Cress*, 243 U.S. 316; and *Monongahela Navigation Company*, 148 U.S. 312.

private funds on private property for private purposes, is no different under the Constitution than a private road on private property which connects with public highways. It makes no sense to say the former is subject to a public right of access and use when we know the latter clearly is not. The regulatory cloud cast on private property rights must be dispersed with clear recognition that navigable waters subject to regulation in aid of navigation as public highways under the Commerce Clause do not include private waterways; access to and use of the same are private property rights which can not be taken without compensation. Petitioner's assertion that the private waterway which is the subject of this suit is subject to a public right of access and use will not pass Constitutional muster, for the result is tantamount to a confiscation of private property rights without compensation in violation of the 5th Amendment to the Constitution.

The decision of the Louisiana Third Circuit Court of Appeal treating Respondent's private canal as private property not subject to public access and use is eminently correct as a matter of Louisiana law; it is respectfully submitted it is also correct as a matter of federal law, and should be maintained by this honorable Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD and LARRY J. BROUSSARD,

Petitioners

VERSUS

VERMILION CORPORATION

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE NATIONAL AUDUBON SOCIETY AS AMICUS CURIAE

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I. QUESTION PRESENTED

The basic issue in this case is whether State trespass laws may be used to prevent trespasses on artificial canals constructed with private funds on private lands.

II. INTEREST OF AMICUS CURIAE

The National Audubon Society is a non-profit Educational and Scientific organization composed of 388,000 members from all fifty states. One of it's purposes is to encourage and promote the conservation of wildlife and to that end it operates

over sixty sanctuaries and nature centers from coast to coast.

One of the oldest and by far the largest of Audubon's sanctuaries is the Paul J. Rainey Wildlife Sanctuary in Vermillion Parish, Louisiana, adjacent to the lands of the respondent, Vermilion Corporation.

Audubon has been bothered by poachers and trespassers in the past and has obtained injunctions in Louisiana courts by using the procedure now being followed by Vermilion Corporation. See, *National Audubon Society vs. White*, 302 So.2d 660, (La. App. 3d Cir. 1974), writs denied 305 So.2d 542.

Audubon's canal system interconnects with Vermilion's eastern canal system, and thus for the reasons set forth in *Audubon vs. White, supra*, Audubon has an interest in the present case. An adverse holding herein will remove the protection afforded Audubon's sanctuary by the ruling in *Audubon vs. White.* 1/

Since the Rainey Sanctuary consists of marshland, the only practical means of surface transportation on the Sanctuary is by boat. Consequently over the years a network of canals has been excavated for access and to promote nature conservancy.

1/ **The Rainey Sanctuary comprises 26,000 acres of marshland. It was donated to the National Audubon Society in 1924 by Mrs. Grace Rogers Rainey. A condition of the donation was that Audubon "shall use the said land in perpetuity as a 'sanctuary for wildlife' and primarily for wild birds;". An account of the operation of the Rainey Sanctuary and many of the concerns which will be voiced in this brief may be found in greater detail in the Society's magazine, "*Audubon*", July, 1978, Page 18, "Land of the Snow Geese, Three Corner Grass - and Lonnie Lege" by Schueler.**

Canal excavation commenced with Audubon's predecessor, E.A. McIlhenny, who in 1912 excavated the north/south canal which bears his name. *Audubon vs. White, supra.* This canal was the subject of the litigation with the Whites and also was the canal in question in *(Mc) Ilhenny vs. Broussard*, 172 La. 895, 135 So. 669 (La. 1931).

The McIlhenny Canal is eighty feet wide by about 10 miles in length. There are fourteen additional miles of eighty foot canal on the Sanctuary.

Audubon or its assignees have also dredged 17.5 miles of forty foot canal, 3 miles of ten foot canal, and 2 miles of twenty-five foot canal.

In addition to these main canals, Audubon has approximately twenty-five miles of pirogue trails and mud boat ditches which measure four feet wide, more or less.

Thus, on Audubon's 26,000 acre sanctuary, there are more than 70 miles of internal canals.

Audubon's sanctuary is a relatively small part of the extensive sanctuary and game preserve system which blankets the west half of Louisiana's vast coastal marshes. Beginning on the east with 80,000 acre Marsh Island, also called Russell Sage Wildlife Refuge, then traversing west to Louisiana's 15,000 acre State Wildlife Refuge, thence to Audubon's own 26,000 acre Rainey Sanctuary and continuing westerly to the enormous Rockefeller Refuge and Game Preserve of 80,000 acres, on to the 35,000 acre Lacassine National Wildlife Refuge, and finally to the largest of all, Sabine National Wildlife Refuge comprising 140,000 acres, it becomes apparent that to the good fortune of the Americna people, a substantial portion of Louisiana's marshland has been preserved as a haven for wildlife.

Additionally, there are many owners of larger portions

of marshland, such as Vermilion Corporation, who carefully control hunting and trapping on lands in these same areas to the extent that their acreage must be considered to be wildlife management areas.

Each of these major sanctuaries and private land ownerships also have extensive internal canal systems similar to those of Audubon and Vermilion. Though these may, by chance, connect up with one another at given points or with naturally navigable waters, for the most part they serve only the inner areas of the refuges or the lands of the private land owners.

In ***White, supra,*** the Louisiana Court of Appeal for the Third Circuit accepted Audubon's argument that:

> "... a wildlife sanctuary cannot be operated successfully if the general public is permitted to use the canal, and that for that reason, they have constantly limited the use of it to persons who they felt had legitimate business interests which justified the issuance of permits to them."

Audubon still maintains that same argument as to the Rainey Sanctuary and, because of Audubon's wide interest in nature conservancy, it urges the same argument as to the many other wildlife sanctuaries and privately owned game preserves spread westerly along Louisiana's south coast from Cote Blanche Bay to the Sabine. Together they constitute the greatest wintering ground for water fowl in North America.

III. ARGUMENT

A. There is a Compelling State Interest Which Mandates that Louisiana Control the Regulation of its Private Canals. There is No Offsetting or Compelling Federal Interest in Control of the Canals, and Imposition of a Federal Navigation Servitude Would be Contrary to the Tenth Amendment.

This Honorable Court held, in ***National League of Cities v. Usery***, 426 U.S. 833, 842, 96 S. Ct. 2465, 2470, 49 L.Ed. 2d 245 (1976), citing other authorities:

> "While the Tenth Amendment has been characterized as a 'truism', stating merely that 'all is retained which has not been surrendered,' ***United States v. Darby***, 312 U.S. 100, 124, 61 S. Ct. 451, 462, 85 L.Ed. 609 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

Usery mandated recognition of certain powers reserved to the states. In the same vein, in ***Oregon, ex rel. State Land Board vs. Corvallis Sand & Gravel Company,*** 429 U.S. 363, 378, 97 S. Ct. 582, 591, 50 L.Ed.2d 550 (1977), this Court held:

> "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' ***Davies warehouse Co. v. Bowles,*** 321 U.S. 144, 155, 64 S. Ct. 474, 480, 88 L.Ed. 635 (1944). This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of ***Swift v. Tyson,*** 16 Pet. 1, 10 L.Ed 865 (1842), an exception was carved out for the local law of real property. ***Id.***, at 18. See, ***United States v. Little Lake Misere Land Co.***, 412 U.S. 580, 591, 93 S.Ct. 2389, 2396, 37 L.Ed. 2d 187 (1973)."

Corvallis, a case involving the bottom of a natural waterway, recognized that state laws should govern property ownership.

If state law must be applied in cases involving water bottoms, and if the states have retained, through the Tenth Amendment, the power to define the rights of property owners in relation to other private parties, then it follows that the issuance of an injunction by a state court is proper when needed to protect a property right arising from lands which were formerly fast lands, though now affected by an owner-constructed canal.

If Louisiana, with its vast marshes, is to function effectively in a federal system in which other states don't have the problem of regulating the use of private canals to nearly the degree that Louisiana does, then Louisiana's right to prohibit trespass on private canals should be maintained.

What compelling federal interest has been advanced in this case? Three individuals undertook for a short period of time to fish for shrimp in a canal system which was clearly marked as private (by more than 400 signs), despite receiving numerous notices that they were trespassing and poaching in an area where they did not have permission to intrude.

Their actions took place four years ago, but they still stand alone, isolated examples of willful trespass in private canals.

In the companion case being considered, ***United States vs. Kaiser-Aetna***, 408 F. Supp. 42 (Haw. 1977), aff., 584 F.2d 378 (9th Cir. 1978), the only federal interest arises from a government agency's bootstrap attempt to expand its jurisdiction. As a former Secretary of the Army this writer is aware of this proclivity. It is no more the stuff from which a compelling federal interest can be deduced than is the isolated action of three trespassers in Louisiana.

By contrast, Louisiana's compelling state interest arises

arises from its unique topography. 2/ The entire lower tier of the state, from Mississippi to Texas, is marshland. Much of this marshland is subject to private ownership or, as stated previously, to control by state and private wildlife organizations such as Audubon.

It is patently in Louisiana's interest to regulate property rights in its unique marshland, and while there are numerous public waterways crossing these marshlands, such as the Intracoastal Waterway running east and west across the entire state, and numerous north/south public waterways such as the Freshwater Bayou Canal in question in the present case, it is clearly in Louisiana's interest to provide its citizens with protection for their internal communications systems, whether these systems consist of private roads on highlands or private canals in marshlands.

Reverting for the moment to the question of imposing the navigation servitude on these privately constructed canals, the early Louisiana canal case, ***Harvey v. Potter***, 19 La. Ann. 264 (1867), in upholding the private right of Harvey to his canal stated:

> "The right of expropriation, it is true, belongs to the public, and the land and canal so constructed upon it, might under Constitutional and legal provisions, become public property, and be appropriated to public use. ***But where no public need exists for such conversion,*** and the private property in its entirety is subjected to private ownership, it would seem that the proprietor

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2/ As late as 1945, New Orleans had more miles of canal than Venice. Congress recognized very early the need for canals, reserving New Orleans' greatest landmark, Canal Street, as a site for a canal to be operated by a state chartered private corporation. Ironically, this canal was never built. See, Acts of Congress, March 3, 1807; U.S. Statutes at large, Vol. 2, Page 440, Section 3.

has the right, in any manner he deems best, to render that property most productive . . ."
(Emphasis Added)

In this present case, where is the public need for conversion of Vermilion Corporation's canals to public use? Vermilion's canals had never before been used for shrimping. Its canals, as are Audubon's canals, are dead-end canals for the most part, providing access to oil and gas drill sites.

In Audubon's case as in Vermilion's case, the only parties who come into the canal systems maintained by these two property owners are parties who have business with these property owners. In Vermilion's case, these are hunters and trappers, in addition to the oil company land owner. In Audubon's case, these are naturalists, ornithologists and botanists, in addition to mineral lessees and others. Nevertheless, the principle is the same and poaching will do great harm to the primary interests of both of these property owners.

Louisiana's present system works. It has accomplished Louisiana's purposes for over a century. There's no compelling reason to change it.

Over fifty years ago, this Honorable Court decided a Louisiana case which demonstrates the correct procedure for condemning private canals to allow public use when there is public need. In *Hanson Lumber Co. vs. United States*, 261 U.S. 581, 67 L.Ed. 809, 43 S. Ct. 442 (1923), this Honorable Court was dealing with a privately owned canal which had been deemed essential to the completion of the Intracoastal Canal.

The Secretary of War utilized Congressional acts which conferred on him the power to condemn land and other property needed for the construction, including specifically the Hanson canal. The refusal of the canal owner to sell the Hanson canal to the Secretary of War caused a five year delay in the

completion of the canal, from 1918 to 1923. See, "Report of the Chief of Engineers, U.S. Army", 1918-1924 inclusive, section entitled "Intracoastal Waterway, Franklin to Mermentau, Louisiana."

In *Hanson, supra*, this Honorable Court affirmed the power of the Secretary of War to condemn the Hanson canal and affirmed an award of $65,000.00 for the taking. The arguments now being advanced to justify the right of the Corps to take a privately owned canal for use by the public without compensation or determination of necessity weren't raised in *Hanson*.

Hanson illustrates the proper condemnation and compensation procedures, coupled with Congressional mandate, which should be followed in order to transform a private canal into a public one.

B. The National Audubon Society and Its Neighbor, Respondent Vermilion Corporation, Occupy Adjacent, Similar Marshlands. Discarding Louisiana's Well Established Right of Private Control Over Private Canals will have Equally Disastrous Consequences for Both.

Being the eastern neighbor of Respondent Vermilion Corporation, and having access to the records of its predecessor, McIlhenny, Audubon is in an advantageous position to compare its situation to Vermilion's situation in the present litigation. As a party plaintiff in both the *Ilhenny* and *White* cases, Audubon has experienced the problems faced by Vermilion in the present litigation.

For the Court's clearer understanding, Audubon likens the canal system in question here to the fingers of a hand spreading westerly from a wrist anchored to the Freshwater Bayou Canal on the east. A sole artery at the eastern, wrist end of this hand constitutes the only connection with a public waterway, the Freshwater Bayou Canal. The fingers spread out generally

westerly to dead-ends which were drill sites or now serve as mineral production locations. There are much smaller arteries which are the trappers' canals and pirogue trails, excavated much earlier. This hand doesn't reach the Gulf to the south, nor the Intracoastal Waterway to the north. It's a self-contained system, and it was within this system that the petitioners were apprehended on numerous occasions while shrimping in Vermilion's canals.

On the east side of the Freshwater Bayou Canal, there is a similar hand-shaped canal system, running easterly, to which Audubon's system interconnects at two points.

The point of the hand analogy is that the fingers of the system are dead-ends. The system is not an open ended, connecting commercial conduit. It serves Vermilion's lands only. Rainey, likewise, has no connection with the Gulf of Mexico except through other waterways.

Just as a contention was made in 1931 in the *Ilhenny* case that Audubon and McIlhenny's canal was taking water from a natural channel and thus causing it to silt up, the petitioners in this case are belatedly contending that Freshwater Bayou silted up because of Vermilion's canal system.

In addition to the reasons given by the Louisiana courts in *Ilhenny* and in Vermilion's case by the Louisiana Third Circuit, Audubon respectfully points out to the Court that all questions concerning any possible effect on Freshwater Bayou by Vermilion's canal system were rendered moot by the action of the Corps of Engineers.

When Freshwater Bayou Canal was constructed by the Corps, it built a levee around the southernmost portion of Freshwater Bayou, from the point where it entered the Gulf for a distance of two miles northerly, and used this area to deposit spoil removed during the dredging of the new canal. This obliterated

the portion of Freshwater Bayou lying east of the Freshwater Bayou Canal.

On the west side of the Freshwater Bayou Canal, the Corps dammed the mouth of Freshwater Bayou at the point where it courses northwesterly from the canal, completely plugging it at the point where it would normally flow from Vermilion's marsh into the public canal.

Since the Corps of Engineers has effectively obliterated Freshwater Bayou, it serves no useful purpose to pursue the question of what effect Vermilion's canal system may or may not have had on Freshwater Bayou.

The brief of the Solicitor General makes much of the question of signs being posted on artificial canals so that the navigating public will understand that it has traversed from a public to a private canal. As Audubon established in the ***White*** case, the points at which its canal system connect to public navigable waters are marked by billboards, five feet by six feet in size, advising the public of the private nature of the canal. Vermilion Corporation's four hundred "No Trespassing" signs compare favorably in terms of commanding the attention of the public.

The report of ***Audubon vs. White, supra,*** establishes that Audubon has granted permits to the Corps of Engineers in the past to allow the Corps the use of Audubon's canals, just as Vermilion has done. The Corps has thus recognized both Audubon's and Vermilion's right to control access to their canals.

We now turn to the somewhat absurd result which will be reached if the Ninth Circuit's holding in ***Kaiser-Aetna*** is carried to its logical extreme with respect to the boat houses which belong to Vermilion and Audubon at their respective headquarters in the vicinity.

These boat houses are large, open-ended structures straddling canals. They resemble old-fashioned covered bridges, except that in lieu of a floor or bridge, their bottoms are a segment of the canals in question. In the case of Vermilion's boat shed, traffic may proceed up or down the canal from either end. The *Kaiser-Aetna* holding would open these boat houses to through traffic.

This calls to mind the Solicitor General's reference to *United States v. Causby*, 328 U.S. 256, 260-261 66 S. Ct. 1062, 90 L.Ed. 1206 (1946), in which this Honorable Court held that the navigable air space of the United States above Causby's chicken house was open to the aviating public. However, the Solicitor General mistakenly concluded that in *Causby* this Court held that the aviation servitude could be exercised without compensation being paid to the owner of the land. This was not the case. In *Causby*, the United States had to pay for Causby's chickens, lost because of noise from Air Force bombers. Similarly, in the present case the navigation servitude can't be invoked without proper determination and just compensation.

C. Audubon's Wardens Will Encounter Serious Problems if the Present Louisiana Private Canal Jurisprudence is Overturned.

Audubon has reviewed the briefs filed by the petitioners and the Solicitor General and has reviewed drafts of the briefs filed by the respondent, Vermilion, and several of the amici curiae. Audubon's concern differs somewhat from the concerns of the parties and other amici.

That is, Audubon purports to speak not only for itself, but in the interest of the wildlife on its Sanctuary and the adjoining sanctuaries. As an example of this concern, Audubon participated in a program whereby 1500 live alligators were transported from neighboring Marsh Island and the State Game Refuge to states in which alligators had become scarce.

Audubon approves and adopts by reference the briefs that the respondents and other amici curiae have submitted with respect to Fifth Fifth Amendment protection and the requirement of just compensation. However, compensation is not Audubon's sole concern.

Audubon's goal is to preserve this marsh and, where needed to return it to pristine condition.

There is no more marsh to be purchased in the event of an award of compensation, and if the marsh we have is lost, we will all be poorer.

Many of the pirogue trails and mud boat trails which extend into the marsh on the Rainey Sanctuary were excavated to allow shrimp and crab larvae to penetrate deep into the marsh for protection as they mature. These canals also provide access to Audubon's artificial canals and in turn to outside waters when the shrimp and crabs reach maturity. If, by improving the marsh for these propagation purposes, the marsh is opened and access is provided for poachers, what has been accomplished?

In *Audubon vs. White, supra*, the Louisiana Third Circuit misread the record when it found that Audubon has a staff of thirty wardens at the Rainey Sanctuary. Actually, Audubon's Sanctuary director testified that his entire staff, nationwide, totals thirty. The Rainey Sanctuary is patrolled by only two wardens. See, "Audubon", July, 1978, and the record in *Audubon vs. White, supra.*

In the *White* case, the Louisiana Third Circuit correctly found that these wardens manage to patrol this enormous refuge because they recognize on sight all boats which have a permit to use these canals. If the Rainey Sanctuary is suddenly opened to traffic by all comers, these two wardens can't possibly patrol approximately seventy miles of canals. Ef-

fective patrolling under these circumstances would require the construction of fences along the crests of the levees lining both banks of all the canals, plus many more wardens. Physically and economically, this is all but impossible.

The worst problem which Vermilion and Audubon would face in the event of an adverse decision is erosion. The banks of all of these canals are composed of organic matter and are highly vulnerable to wave action. Audubon requires that all boat operators proceeding on its canals reduce their speed to prevent erosion. If these landowners can't control the speed of boats using their canals, their game management programs will suffer.

In addition to causing erosion, wave action from speeding boats kills the young of the nesting native mottled duck population. These young water fowl and other species are vulnerable to wave action because they crowd against the canal bank and tend to be caught and drowned under successive waves.

As the article in "Audubon,"July, 1978, mentioned, Audubon is not only concerned with producing minerals in order to raise revenue for its sanctuaries. It is also anxious to set an example for the oil and gas industry and for South Louisiana landowners, demonstrating that oil development, if properly managed, is compatible with nature conservancy.

Audubon's mineral lease forms provide numerous safeguards for the sanctuary. If Audubon is deprived of the right to regulate the traffic passing through its canals, some of these safeguards will be useless since Audubon's canals will be open to use by all who choose to travel them, including irresponsible mineral operators.

The very limited amount of low-speed traffic allowed by Audubon at the present time still results in occasional alligator and fish kills due to boat propellors. With unlimited, high-speed traffic the threat to these species will increase.

Finally, Audubon is compelled to mention the butterfly net devices which were being used by the three peittioners. The butterfly net rig is a simple but effective mechanism which may be attached to small, lightweight, aluminum flatboats. The net frames consist of pipes forming the sides of an eight foot square. A frame is attached to each side of the flatboat by a hinge. Monofilament nets trail from the edges of the frames. After the boat is underway, the frames are lowered so that they are completely below the water and scoop up everything in their path.

These devices are so efficient at clearing all life from canals that the Vermilion Parish Police Jury, the governing body of the parish (county) in which the Rainey Sanctuary is located, on March 20, 1978, adopted a resolution recommending "to the legislative delegation of Vermilion Parish to support legislation that would outlaw the use of butterfly nets in Southwest Pass and throughout Vermilion Parish."

IV. CONCLUSION

There is no compelling reason to impose the navigation servitude in this case. Federal law does not clearly require it and state law clearly mandates against it.

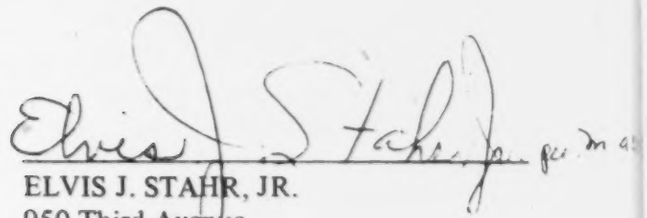
The Louisiana rule has functioned well for Louisiana's unique situation for over 100 years. Since ***Harvey v. Potter, supra,*** the only parties who have complained of the Louisiana rule have been six trespassers, i.e., the three petitioners, the two Whites, and Joseph Broussard in the ***Ilhenny*** case.

On the other hand, the National Audubon Society's Rainey Sanctuary and the numerous other wildlife sanctuaries and game management preserves along Louisiana's southwest coast have been able to serve their functions for the benefit of wildlife and the public as a whole for many decades without substantial interference from poachers or trespassers. An

unneeded change in the jurisprudence would disrupt this.

The National Audubon Society submits that the decision of the Louisiana Third Circuit Court of Appeal is proper and correct as a matter of Louisiana law, as a matter of federal law and as a matter of public policy. It is respectfully requested that this decision be maintained by this Honorable Court.

Respectfully submitted,



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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners

versus

VERMILION CORPORATION,
Respondent

AMICUS CURIAE BRIEF FOR RAMOS INVESTMENT CO.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND
LARRY J. BROUSSARD,
Petitioners

versus

VERMILION CORPORATION,
Respondent

AMICUS BRIEF FOR RAMOS INVESTMENT CO.

I.

OPINIONS BELOW

The opinion of the Court of Appeal for the Third Circuit of the State of Louisiana is reported at 356 So.2d 551 (La. App. 3rd Cir. 1978), *writ denied,* 357 So.2d 558 (La. 1978).

II.

INTEREST OF AMICUS CURIAE

Ramos Investment Company is a Louisiana partnership which owns and maintains extensive land property in the Atchafalaya Basin in south-central Louisiana. Numerous private waterways similar to those in question in these proceedings are situated on this property. Many of these waterways, including artificial canals, were constructed to provide access for mineral and timber operations, and for drainage,

irrigation, reclamation and recreational activities. They were constructed with private funds and are used only with the permission and authorization of the landowner. As such waterways have historically been treated under Louisiana law as the private property of the individual landowners on whose property they are located, subject to use under such landowner's exclusive regulation, it seems clear that the partnership's holdings will be directly affected by the decision of this Honorable Court on the issue of unrestricted public access to and use of such waterways.

While an adverse ruling by this Court on this issue will act to deprive Ramos Investment Company of some part of the value of their property rights under Louisiana law, it will also present certain questions involving the burden of maintaining and policing the waterways. Although these controversies are not before the Court at this time, the possibility that such issues will be generated by this Court's treatment of the present controversy is also of concern to the partnership.

III.

INVOLVED PROVISIONS OF LAW

(1) U.S. Const. art. 1, §8, cl.3:

"The Congress shall have power to regulate Commerce with Foreign Nations, and among the several states. . . ."

(2) U.S. Const. amend. V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(3) U. S. Const. amend. X:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(4) 33 U.S.C. 403, which reads, in part, as follows:

"The creation of any obstructions not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited . . . ."

(5) The Louisiana Organic Act, 2 Stat. 703, which reads, in part, as follows:

"[i]t shall be taken as a condition upon which the said state is incorporated into the Union, that the Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and [forever] free, as well to the inhabitants of the said state as to inhabitants of other states. . . ."

IV.

QUESTIONS FOR REVIEW

(1) If a private citizen on its privately held real property and with its private funds creates a system of artificial navi-

gable waterways, in part via diversion, of a natural navigable waterway which flowed through that property, does the artificially developed waterway system, which is connected to other interstate navigable waters and to the seas, thereby become part of the "navigable waters of the United States," subject to a "navigation servitude" in favor of all citizens of the United States?

(2) Are channels built on private property and with private funds, which thereby are made to join with admitted and preexisting tidal and other navigable waterways, and which are themselves navigable in fact and tidal, "navigable waters of the United States", burdened with "navigation servitude" in favor of public?

V.

ARGUMENT

A. *Under Louisiana law, artificially created waterways, built on private land with private funds for private use, are private property not subject to a public navigation servitude.*

Article 450 of the Louisiana Civil Code provides, in part, that: "public things that belong to the State are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea and the seashore." Comment (f) to Article 450 illustrates that the phrase "natural navigable water bodies" refers to waters, the bottoms of which belong to the State either by virtue of its inherent sovereignty or by virtue of other modes of acquisition." Artificially created canals on private property for private use are private things just as a private road on private property created for private use is also a private thing. *(See Vermilion Corp. v. Vaughn,* 356 So.2d 551 (La. App. 3rd Cir. 1978); *writ denied,* 357 So.2d 558 (La. 1978) *cert. granted* 99 S.Ct. 1211 (1979); *National Audubon Society v. White,* 302 So.2d 660 (La. App. 3rd Cir. 1974), *writ denied,* 305 So. 2d 542 (La. 1975); *Ilhenny v. Broussard,* 172 La. 895, 135 So. 669 (1931)). The Louisiana Third Circuit Court of Appeals in its opinion in these proceedings found *Ilhenny v. Broussard* controlling. Thus, in Louisiana the law permits private ownership of artificially created canals on private property.

1. *The authority to create and regulate rights to property within their boundaries is reserved to the several states.*

Under the Equal Footing Doctrine, states admitted after the initial formation of the Union are accorded the same rights, sovereignty and jurisdiction as the original states. (*Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Coyle v. Smith,* 221 U.S. 559 (1911); *Draper v. United States,* 164 U.S. 240 (1896). Among these rights is the authority to create and regulate property rights, in particular, property rights in navigable waterways, their banks and their bottoms. *United States v. Kaiser-Aetna,* 408 F.Supp. 42 (1976), *cert. granted* 99 S. Ct. 1211 (1979); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Northern Transportation Co. v. Chicago,* 99 U.S. 635 (1879); *North Shore Boom and Driving Co. v. Nicomen Boom Co.*, 212 U.S. 406 (1909); *Wisconsin v. Duluth,* 96 U.S. 379 (1877). Louisiana's creation of private property rights in artificially created canals on private property is a valid exercise of the State's power to create and regulate rights in property within their boundaries.

Implicit in a state's sovereignty is the power to regulate its internal affairs by such laws as it deems wise. This is an in-

herent power, retained by the states and not surrendered to the federal government. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Federal law will not supersede a proper exercise of the state's power over property within its boundaries unless the act in question directly conflicts with an act of Congress passed pursuant to power granted by the United States Constitution. *Cohen v. Bredehoeft*, 290 F.Supp. 1001, *aff'd* 402 F.2d 61 (D.C. Tex. 1968), *cert. denied* 393 U.S. 1086 (1969). The court in *Cohen* went on to hold that the Commerce Clause (U.S. Const. article I, section 8, clause 3), by itself, does not preclude states from regulating matters of the health, life and safety of their citizens even though such legislation might indirectly affect an area over which concurrent federal jurisdiction to regulate is established by the Constitution.

2. *Treatment of private artificial canals by the State of Louisiana as if such canals were real property is a proper means of managing problems peculiar to the geography of the area.*

Article 450 of the Louisiana Civil Code is a recognition by a sovereign state that property rights in artificial private canals originally vested in real property prior to the construction of the canals. Logically, the Louisiana legislature has treated these rights consistently with the history of the property so as not to deprive the owners of the value of previously vested rights. As such, Louisiana law is well tailored to encourage property owners to improve their property by digging canals. This incentive is particularly meaningful in Louisiana because of the marshy nature of the property in question, which permits travel only by limited means, principally over water. If improving property by digging a canal results in devaluation or loss of a property right, development of resources by private interests will be discouraged.

This may impede the interests of commerce far more than the injunction before the Court.

3. *Destruction or devaluation of state granted property rights through creation and exercise of public navigation servitude requires express congressional authorization.*

. . . . .

Article 450 and its judicial construction recognize the private property rights granted in banks and bottoms of artificial waterways as well as rights equivalent to usufructs relating to the use of the water during its flow across private lands. Significantly, it is well established by federal law that the shores of navigable waters and the soil under them were not granted to the United States by the Constitution but were reserved to the several states. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842); *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 221 (1845); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 756 (1867); *Shively v. Bowlby*, 152 U.S. 1 (1893); *St. Anthony Falls Water Power Co. v. Board of Water Commissioners*, 168 U.S. 347 (1893); *Appleby v. New York*, 271 U.S. 364 (1926). Although *Pollard's Lessee v. Hagen* was modified in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), by a holding that the state's title to the banks and bottoms of navigable waterways is held in trust for public use, nevertheless, the state maintains authority to determine what treatment of the property is most beneficial to the public at large.

In *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249-52 (1954), this Court recognized a state granted usufructary right to the use of waters of a navigable stream of the United States for the generation of power. The Court held that the state's grant was subject to a dominant servitude in favor of the United States, but recognized that clear congressional authorization was an absolute

pre-requisite to exercise of that servitude when no allowance has been made for preexisting rights under state law. The ultimate result in *Niagara Mohawk* rested on the finding that the Federal Water Power Act of 1920 did not express clear congressional intent to abolish state granted property rights over navigable water. There, the legislation did not authorize exercise of the federal government's dominant servitude.

In the present controversy, the State of Louisiana has granted proprietary rights in accordance with the rights of sovereignty possessed by it since its entry into the Union. The granting of such rights has been upheld consistently, with respect to the banks and bottoms of navigable waters as well as to the flow therein. Where congressional intent to abrogate state granted property rights is ambiguous, federal legislation should be interpreted to give effect to the rights granted by the state. *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954). *See also, Volkswagen de Puerto Rico v. Labor Relations Board of Puerto Rico*, 331 F.Supp. 1043, *aff'd* 454 F.2d 38 (D.C. Puerto Rico 1970). In fact, it has been held that until the United States assumes control over an aspect of an instrumentality of interstate commerce, the state involved will retain its authority thereover. *In re Silver Bridge Disaster litigation*, 381 F.Supp. 931 (S.D.W. Va. 1974).

4. *Incidental shifting of a water course, in the geographic context of fragile, ever changing Louisiana wetlands, is not a realistic basis for recognizing a public navigation servitude where none had existed before.*

Petitioners assert that Respondent's artificial private waterways were created, at least in part, through diversion of the waters of a navigable stream which had once been used in commercial navigation. While there was no proof of this

assertion in the record below, it is submitted that had such diversion occurred, it would be insufficient in itself to justify the recognition of a public navigation servitude on Respondent's waterways. In *Leovy v. United States*, 177 U.S. 621 (1900), this Court considered the navigable status of waterways created by the diversion of waters of the Mississippi River through a small crevasse which had been used for navigation in interstate commerce by various small luggers and yawls, and which was clearly navigable in fact. The Court there held that the waterway was not a "navigable water of the United States" within the meaning of the Rivers and Harbors Act of September 19, 1890. Thus, the Court refused to recognize a navigation servitude in that waterway; a waterway which had actually been used in public commercial navigation and which was created through diversion of a far more substantial waterway than any involved in the present dispute.

It is essential that the Court consider the unique geophysical nature of Louisiana's marshland. Constant shifting of the soil and waters is characteristic of these wetlands and has caused charting of the region's watercourses to remain substantially incomplete. If the rights to property are held to change with every shift in the flow of waters to the Gulf, the regulation of property rights by Louisiana will become a hopelessly complex task, with the result that property owners will never be quite certain of what rights they possess.

Further, absent proper records illustrating the continuing evolution of this watery region, factual determination of the extent to which these waterways owe their genesis to other navigable waters though diversion would seem near impossible. To encourage alteration of state granted rights on the basis of such hazy factual evaluations would not be wise.

B. *Artificial canals are not "navigable waters of the United States" and are not subject to public navigation servitude without express congressional authorization.*

1. *The canals are not "navigable waters of the United States" because they were not navigable in their ordinary and natural condition.*

Generally, it has been held that all waters are navigable waters of the United States where they form in their ordinary condition by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). *See also, The Montello*, 87 U.S. (20 Wall.) 430 (1874); *South Carolina v. Georgia*, 93 U.S. 4 (1876); *Leovy v. United States*, 177 U.S. 621 (1900). While it has been stipulated that the waters in question are navigable in fact, Respondents did not show that they were, in their natural and ordinary condition, susceptible to use as part of a continued highway of interstate commerce. To the contrary, the canals were not susceptible for use in interstate commerce in their natural and ordinary condition. They possessed neither the volume of water, the gradients nor the regularity of flow necessary for navigation. It was only by the expenditure of extraordinary effort that these waterways came into existence such as permits their use in commerce at all. (For discussion of the phrase "natural and ordinary condition" as it relates to navigable waters of the United States, *see United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), *rehearing denied* 312 U.S. 712 (1941).

2. *Even if Respondent's canals are deemed "navigable waters of the United States" no public navigation servitude may be exercised without congressional authorization.*

The exercise of a navigation servitude by the federal government as an attribute of its dominant servitude over "navigable waters of the United States" requires clear authorization by Congress for the reasons set forth in part A(3) of this brief.

C. *The Rivers and Harbors Act (33 U.S.C. § 403) is not applicable to injunctions issued under state law to protect property rights in private artificial waterways.*

1. *Privately owned, artificial waterways are not "navigable waters of the United States" such as are contemplated by the statute.*

Louisiana law making artificial canals built on private property with private funds subject to private ownership does not conflict with the Rivers and Harbors Act (33 U.S.C. § 403). Although section 403 does prohibit the creation of any unauthorized obstruction to the navigable capacity of any of the waters of the United States, whether the phrase "navigable waters of the United States" was intended to apply to Louisiana's private artificial canals is a question which has yet to be resolved. It has been held that all waters are navigable waters of the United States where they form in their ordinary condition by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). *See also, The Montello*, 87 U.S. (20 Wall.) 430 (1874). *South Carolina v. Georgia*, 93 U.S. 4 (1876); *Leovy v. United States*, 177 U.S. 621 (1900). While it has been stipulated that the waterways in question are navigable in fact, they were not susceptible for use as part of a highway of interstate commerce. See part B(1) of this brief.

2. *Injunctions issued under state law to protect property rights in private artificial waterways are not "obstacles" as are contemplated by the statute.*

While it may be argued that the purpose of the Rivers and Harbors Act is to keep open for interstate commerce all navigable waters within the United States such as are susceptible to that use, a close tracking of the statute fails to reveal this intent. More precisely, the statute is intended to maintain those natural navigable waterways of the United States susceptible for use in interstate commerce free of physical obstruction such as would impede that commerce. This purpose does not require the abrogation of property rights granted under Louisiana law in that it neither contemplates nor requires application of the statute to artificially created canals. Additionally, application of the statute to Louisiana's artificial waterways would necessarily deprive owners of property rights acquired under state law. In so doing, it may be expected to remove the incentive created under Louisiana law for private owners of wetlands to create navigable waterways and thereby ultimately have the result of retarding the development of the nation's system of navigable highways.

Petitioners have invoked the federal prohibition against unauthorized obstructions on navigable waterways of the United States on the theory that an injunction issued to protect state granted property rights is an obstruction such as is contemplated by the act. Having set forth the terms of its prohibition generally, the statute lists obstructions which are not permitted. Thus, it states, "it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States" (33 U.S.C. § 403). While this list serves merely to illustrate what manner of obstruction the

statute seeks to prescribe, it is clear from first reading that the drafters restricted themselves to physical obstacles. No cases have applied this statute to "legal obstructions" like that in the instant controversy. Furthermore, it seems unlikely that the drafters of this section intended to prohibit the use of injunctions by all courts with respect to navigable waterways. Such a broad reading of the statute would have the effect of invalidating all injunctions issued to protect private property rights in navigable waterways whether those rights were granted by state or federal authorities.

3. *Judicial expansion of the terms of the statute is an improper means of creating a navigation servitude over artificial waterways.*

Even if the private waterways in question are found to be navigable waters of the United States, and as such within the regulatory authority of the federal government, this does not of itself create a public navigation servitude. The mere existence of latent federal regulatory power does not mean that a public navigation servitude is thereby created. Such a servitude has never been applied to fast lands or nonnavigable waters without express determination by Congress. *United States v. Cress*, 343 U.S. 316, 325-26 (1917). *Cf., United States v. Grand River Dam Authority*, 363 U.S. 229, 232-33 (1960). The purpose and justification of public navigation servitude has long been recognized as stemming from the need to preserve waterways for present or future commercial needs. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390-91 (1945); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921); *Gibson v. United States*, 166 U.S. 269, 276 (1897).

Thus, navigation servitude over navigable waters may limit private rights to the underlying soil and to uses of the waters because of the paramount public interests rights which the servitude protects. It must be noted however that no such public interest has been recognized in nonnavigable streams. *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 67-70 (1913). The Court there established that public interest in waterways such as gives rise to navigation servitude is based implicitly upon the existence of a reasonable expectation that such waterways are susceptible to use in commerce. In their original condition Respondent's artificial canals were not susceptible to use for commerce. No reasonable expectation existed that they could be made susceptible to commerce by reasonable improvements. In the absence of such expectation, it should not be concluded that the public has a right to use these waterways as improved without compensation to their owners. This analysis is reinforced by *United States v. Cress*, 243 U.S. 316, 326 (1917), where the Court held that improved navigable rivers do not change their status as navigable rivers because of the improvements. In an opinion by the U.S. Attorney General (36 Op. U.S. Att'y. Gen. 203, 214 (1930), it was recognized that wholly artificial portions of improved navigable streams which, like nonnavigable streams, having never been subject to a navigation servitude could not be appropriated without compensation. It was there stated that, "although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owners, and deprive the latter of any investment upon it."

Although the Supreme Court has not addressed this question directly, it opinion in *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852), seems near enough to provide guidance. The Court there upheld an exclusive license granted to private interests allowing them to navigate a stretch of improved waterway over a period of twenty years. The license had been granted in the form of compensation for authorized improvements undertaken by private parties. The Court there distinguished *Gibbons v. Ogden*, finding that the authority exercised in that case did not include the privilege of use of canals made available for navigation by state funds or by privileges that the state had conferred for the accomplishment of that end. It is difficult, perhaps impossible, to conceive of a convincing rationale by which Louisiana may be prohibited from granting private ownership and exclusive navigational use of artificial canals as an incentive for the building of such canals on private land, in the face of the apparent validity of the action of the State of Maine in granting exclusive navigational rights over a waterway improved by private parties.

Although it has been alleged that the waterways in question were created by the diversion of a natural waterway over which interstate commerce had in the past been conducted, it is clear from the holding in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), that the effect on property rights caused by the change in course of a waterway is a matter to be determined under state law and not by the application of federal common law. Even if Petitioners' allegations could be proved, the result under the laws of Louisiana would be unchanged. (*Vaughn v. Vermilion Corporation*, 356 So.2d 551 (La. App. 3rd Cir. 1978), *writ denied* 357 So.2d 558 (La. 1978), *cert. granted* 99 S.Ct. 1211 (1979)).

a. *Creation of a navigation servitude where none had existed deprives the owner of use of the property and is a*

"taking" within the Fifth Amendment of the United States Constitution.

No common law doctrine exists creating a public navigation servitude which is applicable specifically to privately owned artificial waterways. The attempt to apply the doctrine used in *Gibbons v. Ogden* is clearly intended to extend public navigation to waterways on which it has not previously existed. In the event Petitioners' succeed in their effort to so extend navigational servitude to the artificial canals in question, the effect will be to deprive Respondents of the incidents and attributes of vested property rights. Such an extension of this doctrine would constitute a taking and, as there has been no provision authorizing adequate compensation for that taking, would violate the Fifth Amendment of the United States Constitution.

In the past, no public navigation servitude has existed with respect to Respondent's artificially created canals under either the federal or state law.In the absence of an overriding servitude, Louisiana has vested property rights, including exclusive navigational use of the waterways involved, in individuals. These rights vest only in owners of artificially created canals built with private funds on private property and maintained exclusively for private uses. Since the creation of these property rights does not conflict with any previously existing navigation servitude, they should be held valid. Further, in that such rights have been permitted to vest, deprivation of any part of the rights, *i.e.* the right to exclusive navigational use within the boundaries of the private property involved, is a taking as is contemplated by the Fifth Amendment. Insofar as there is no provision for compensation for this taking, it must be held that the creation of public navigation servitude with respect to these properties would be unconstitutional.

While it may be asserted that the creation of a servitude on a waterway is not a "taking" of property such as warrants compensation under the Fifth Amendment, the authority to the contrary is clear. *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Dickerson*, 331 U.S. 745 (1947); *United States v. Causby*, 328 U.S. 256 (1956); *Chicago R.I. & P.R. Co. v. United States*, 284 U.S. 80 (1931). A persuasive analogy may be drawn between the facts in the present dispute and those in *United States v. Causby*, in which it was held that where the exercise of a federal dominant servitude deprives a property owner of the use of his property, the deprivation constitutes a "taking" within the meaning of the Fifth Amendment. In *Causby*, the government had exercised an existing servitude over airspace for navigation with the result that an owner of land below was unable to use his property as intended. The Court in *Causby* held that compensation was required by the Fifth Amendment even though the owner was only deprived of the use of his property. Despite the fact that the taking in *Causby* resulted from the exercise of a federal dominant servitude over airspace, the rationale as it relates to the Fifth Amendment remains applicable.

Simply because the federal government's right to exercise a dominant servitude is limited by the prohibition against uncompensated takings of the Fifth Amendment does not mean that the federal government is without power to create such a servitude. Congress could have expressly authorized the creation of such a servitude or otherwise invalidate the property rights here involved by means of a statute providing adequate compensation for the property which is to be taken. *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954). But Congress has not done so.

b. *Where the creation and exercise of a dominant servitude by the federal government deprives an owner of vested property rights such a "taking" must be compensated under the Fifth Amendment.*

In *Monogahela Navigation Co. v. United States*, 148 U.S. 312 (1893), the private right to control access to navigation on a waterway via a system of locks was taken by condemnation. The Court required the Government to pay for the taking of rights as well as for tangible personal property included in the condemnation. The Court explicitly recognized that Congressional power to regulate commerce was limited by the Fifth Amendment's just compensation clause, *id.* at 336. While it may be argued that the federal government is not required to compensate for takings involving navigable waterways, supporting jurisprudence is distinguishable from the present case in that in those cases either no vested right had been recognized or the taking was incidental to the completion of an expressly authorized government project. *See United States v. Rands*, 389 U.S. 112, 125-26 (1967); *United States v. Virginia Electric & Power Co.*, 365 U.S. 222, 228 (1956); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 62, 68-69 (1913); *United States v. Lynah*, 188 U.S. 445, 470 (1903); *Scranton v. Wheeler*, 179 U.S. 141, 164-65 (1900); *Gibson v. United States*, 161 U.S. 269, 275-76 (1897).

The estoppel rationale of *The Monogahela* is applicable here. Respondents and their lessees have created navigable canals where none existed before. Even if one accepts Petitioner's assertions that Respondent's canals were created in part through diversion of other natural waterways, the clear import of the facts cannot be denied. Respondent's have relied heavily, to their detriment, upon the existence of incidents and attributes of private property rights created by

Louisiana law in private artificial canals. Furthermore, canals created since 1970 have all been authorized by the Army Corps of Engineers. It would hardly be equitable for Respondents to be deprived of the benefits of their effort and investment after having relied both on the law of Louisiana and the good faith of the federal government in approving their construction projects.

Respondents have also relied on the fact that the federal government has not taken upon itself the maintenance or improvement of these waterways, as would be appropriate where waterways were deemed to be subject to a public navigation servitude. The duty to maintain a waterway subject to public navigation servitude is clearly a burden such as was contemplated by the Court in *Armstrong v. United States*, 364 U.S. 40, 49 (1960) when it stated that the Fifth Amendment "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

D. *Absent legislation showing congressional intent to create a public servitude, the Commerce Clause power does not warrant federal interference with state regulation of property.*

Although it has been held that the Commerce Clause may act as a limitation upon state power even without congressional implementation *(Exxon Corp. v. Governor of Maryland*, 98 S.Ct. 2207 (1978); *Great Atlantic & Pacific Tea Co, Inc. v. Cottrell*, 424 U.S. 366 (1976)), it is equally clear that not every exercise of state authority which imposes some burden on the free flow of interstate commerce is therefore invalid. (*Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977)). These seeming-

ly divergent propositions of law have routinely presented the court with the task of balancing the interests of the state in regulating a matter of legitimate local interest against the interests of the federal government in protecting interstate commerce. The interest of the several states in regulating matters concerning property and the rights of individuals has long been accepted as beyond dispute. *See Choctaw and Chickasaw National v. Board of County Commissioners of Love County*, 239 F.Supp. 650 (E.D. Okl. 1965); *Mashunkashey v. Mashunkashey*, 134 P.2d 976 (1942); *Frew v. Bowers*, 12 F.2d 625 (2nd Cir. 1926).

While the power to regulate matters relating to property rights is doubtless one of those powers reserved to the states by the Tenth Amendment of the U.S. Constitution (*United States v. Oregon*, 295 U.S. 1, 14 (1935), *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)), it is also clear that neither the reservation of a power to a state under the Tenth Amendment nor recognition of its sovereign authority to regulate requires that state law govern where it stands in conflict with an overriding principle of federal law, *id.* The Constitution's reservation of powers under the Tenth Amendment has been termed "but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 10, 123-24, (1941). It is respectfully submitted that it is more, as this court recognized in *National League of Cities v. Usery*, 96 S.Ct. 1465 (1976). In *Usery*, the Court invalidated an Act of Congress as exceeding the commerce power (*See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)), in finding that as the 1974 Amendments to the Fair Labor Standards Act of 1938 operated to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [Article] I, [Section] 8, [Clause] 3" (96 S.Ct. at

2474). The Court thereby recognized that the powers reserved to the several states to control matters of local interest need not be overwhelmed by the weight of the commerce power even as implemented by explicit act of Congress.

In the present controversy, Petitioner seeks to defeat the established law of Louisiana, exercised to regulate an area of local interest, through the invocation of an unusual melange of ill-defined "federal common law" and dormant Commerce Clause power. Petitioners assert that the federal government's interest in maintaining Respondent's artificial canals for public use is substantial. This assertion is without basis in the facts. Prior to the extraordinary measures taken by Respondents and their lessees to develop the artificial waterway system, no reasonable expectation existed as to a public right to use those waterways for navigation. At no time since the creation of these canals have they been open to the public for use. Thus, no reasonable expectation could have arisen. Louisiana, on the other hand, maintains a compelling interest in regulating of the management of real property within its borders. It has no way discriminated against interstate commerce in its regulation of these matters. The burden which its laws are purported to have created upon interstate commerce is incidental to its proper management of local interest and has in no way deprived either the federal government or its citizens of property in which they have a vested interest.

CONCLUSION

In its balancing of the interests involved in this dispute, the Court must consider not only interstate commerce and the sovereign rights of states under the Tenth Amendment, but also the need to provide equitable treatment to persons

holding vested property rights. Respondents and their lessees, who have invested extraordinary time, effort and money in the development of an artificial waterway system on their own real property, should not be deprived of a reasonably expected return on their investments. Creation of a public navigation servitude would not only deprive Respondents of legally acquired rights under the laws of Louisiana but also impede the commercial endeavors for which the canals were built.

In light of the interests of a properly balanced federal system as contemplated by the Tenth Amendment and the interests of that federal system in providing to its citizens due process of law with respect to vested property rights, the opinion of the Louisiana Third Circuit Court of Appeal should be affirmed. In the absence of an applicable statute expressing the intent of Congress that artificially created waterways be subject to a public navigation servitude, a dormant commerce clause should not invalidate property rights granted under state law, particularly, when the effect of that state law on interstate commerce is both speculative and incidental.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 17th day of July, 1979 served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed and first class postage prepaid.

HARRY S. HARDIN, III

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners

V.

VERMILION CORPORATION,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners.

v.

VERMILION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES

I.

QUESTIONS PRESENTED

Whether artificially constructed canals on private lands at private expense for private purposes and navigation, in part intersecting with navigable waters of the United States, become burdened with a Federal navigational servitude, mandating indiscriminate and uncontrolled public access and use?

II.

AUTHORITY TO FILE AMICUS CURIAE BRIEF

The Louisiana Department of Wildlife & Fisheries as amicus curiae files its brief in accordance with the provisions of

U.S. Sup. Ct. Rule 42(4), 28 U.S.C.A. and with the written consent of all parties.

III.

INTEREST OF THE AMICUS CURIAE

Norman Vaughn, Freddie Broussard and Larry J. Broussard, Petitioners, have asked this Court to review the judgment of Louisiana's Third Circuit Court of Appeals holding that a canal on private property constructed and maintained with private funds for private purposes is a private canal subject to private control and that the public has no right to use the waters thereof without permission even though the canal is in fact navigable and connects with other naturally navigable waterways. In so holding the Third Circuit reasoned that since neither the Rivers and Harbors Act (33 U.S.C., § 401, et seq.), nor the Federal Common Law granted individuals the unrestricted right to use a privately owned natural waterway made navigable with private funds, then the public has no right to use an artificial navigable waterway constructed and maintained with private funds. In support of its conclusion that federal law did not afford a public right of access to the canal, the Third Circuit Appellate Court cited *United States v. Kaiser Aetna*, 408 F.Supp. 42 (D.C. Haw., 1976).

The United States Court of Appeals for the Ninth Circuit in *United States v. Kaiser Aetna*, supra, reversed in part the district court in holding that federal regulatory jurisdiction under the Rivers and Harbors Act does extend to a privately owned natural waterway, which had been made navigable by the owner thereof with private funds, and that the public right of access and use of such waterway is inseparable from federal regulatory jurisdiction under the Rivers and Harbors Act. *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir., 1977), writ granted No. 78-738, U.S. Sup. Ct.

The Louisiana Department of Wildlife and Fisheries is an agency of the State of Louisiana legislatively established by La. R.S. 36:602, et seq. (1950) to exclusively manage, protect, conserve and replenish wildlife, fish and aquatic life in the state.

As amicus curiae, it submits this brief in support of Vermilion Corporation, Respondent.

The Department owns and manages approximately 400,000 acres of land on which are located many miles of artificial private canals. These properties are managed as wildlife refuges and management areas for the conservation and replenishment of the state's wildlife, fish and aquatic life. As part of its management program, the Department must close specific canals to public recreational fishing and hunting at night and during various times of the year and on other occasions must obstruct canals for water control and quality.

More specifically, the Department's Rockefeller Wildlife Refuge in Cameron and Vermilion Parishes, Louisiana, is interlaced with approximately 175 miles of canals which have been constructed either by the Department for the installation of water control or water fowl impoundment or by oil companies under lease by the state for access into remote portions of the refuge for mineral extraction. After an oil company completes its drilling venture or the particular well goes dry, the canals are blocked off with earthen plugs or bulkheads to prohibit excessive drainage of the marshes and to prohibit salt water intrusion.

At the Department's Marsh Island Refuge, there are ap-

proximately fifty (50) miles of man made canals and a significant number have been closed with low level weirs to permit water to flow back and forth across the structure. If these structures would not be permitted, thousands of acres of excellent water fowl marshes and marine nursery grounds would be destroyed. These structures, along with the programs adopted by the Department, contribute to the attractiveness of our Louisiana marsh as the major wintering area for water fowl in the Mississippi and Central Flyway.

Regarding the Pointe-au-Chin and Salvador Wildlife Management Areas the Department of Wildlife and Fisheries purchased only the surface rights of the areas with the vendor reserving all mineral interests. The surface ownership and management is extremely critical to the proliferation of fish, and other forms of aquatic wildlife. All mineral access canals are coordinated through the Department with the developing oil companies in order to provide maximum protection of the environment while still permitting an orderly development of the mineral deposits. The loss of control over the use of these canals would be extremely detrimental to both fish and game management programs.

The Department's Pass-a-Loutre Water Fowl Management Area is located at the mouth of the Mississippi River on the existing delta. There the annual high water tends to fill the canals and cause adverse water quality conditions, contributed in part by the very existence of the canals. Complete dominion of these canals is necessary to reverse the ecological unfavorable water conditions.

Should this Court reverse the Third Circuit Court of Appeals and hold that private waterways, constructed and maintained on private property with private funds for private purposes are subject to unlimited public access and use, the

effect on wildlife, fish, and aquatic life management programs would be near fatal, resulting in disasterous effects on the renewable resources which the Louisiana Department of Wildlife & Fisheries is legally responsible to protect, conserve, and replenish. Accordingly, the Court's decision in this case is of great interest to the Department.

IV.

ARGUMENT

A.

THE LEGAL POSITION AND AUTHORITIES CITED BY VERMILION CORPORATION, RESPONDENT, GOVERN THE ISSUES PRESENTED IN THIS CASE.

The Louisiana Department of Wildlife & Fisheries as amicus curiae adopts completely both the legal arguments advanced by Vermilion Corporation, Respondent, and the legal authorities cited in their support.

B.

COMPELLING POLICY INTERESTS IN THE MANAGEMENT OF MARSH LAND HABITAT FOR WILDLIFE AND FISH RESOURCES MILITATE AGAINST THE EXTENSION OF THE FEDERAL NAVIGATIONAL SERVITUDE TO RESPONDENT'S PRIVATELY CONSTRUCTED CANAL SYSTEM ON ITS PRIVATE LANDS.

As pointed out in its statement of interest, the Louisiana Department of Wildlife & Fisheries owns and manages approximately 400,000 acres of land which are interlaced with private canals similar to Respondent's canal system, and

which will be adversely effected if burdened with a Federal navigational servitude.

The lands of Vermilion Corporation and of the Department are characteristically the same, both being coastal marshes whose ecology is very frail and easily disturbed by water quality and mineral exploration.

The areas are unique natural habitat for all forms of fish and wildlife.

The conservation and promotion of the abundant wildlife and aquatic resources located in this habitat require vigilant biological management programs, encompassing continuous on-site surveillance and research at considerable economic expense to the State of Louisiana and to the private owner.

The programs followed by the Department necessitate that public access to and use of the marshes of the refuges and management areas be restricted and completely controlled. As a consequence, at night and at various periods of the year, there is not permitted any access or use whatsoever for hunting or fishing whether it be for sport or for commercial gain. The unlimited public use sought by the Petitioners will completely disrupt the Department's management programs and in time, will destroy the habitat supporting migratory water fowl, fur bearing animals, alligators, fish and other forms of aquatic life, as well as the renewable resources themselves.

By its present policy and authority over access and use of the private canals on the various refuges and management areas the Department provides extensive law enforcement protection. But because of the enormous extent of the areas in question, unfetted public access and use will render law

enforcement impossible, the end result of which will be no practical protection to the animals and fish, the habitat, the trapper, the hunter, or the fisherman.

The management practices followed by Department Biologists make water level and salinity manipulation on the canal systems essential to improve conditions of the marsh and in turn, animal population. This critical function of water control is accomplished by the installation of man made obstructions in the canal systems. Depending on the goals desired, the Department has installed weirs in those canals affected by tides. Bulkheads have been and are used to prevent over drainage and salt water intrusion. Water impoundments, with water levels being controlled by gravity flow, tidal flow or pumps, are used to provide ideal habitat for fur animals, alligators, crayfish, and migratory water fowl. If the canals and water courses traversing the refuges and management areas become burdened with the public use servitude, the wildlife biologists cannot continue their water level control projects, which will cause the destruction of migratory water fowl marshes, the decline of animal populations, and the disappearance of marine nursery grounds.

With the increased demands for energy, oil and gas exploration in the marshes owned by the Department has intensified. Concomitantly, with this intensification, the additional use of coastal marshes for inland waterways, has resulted, causing increased water control problems to the biologists. The added waterway use has necessitated the construction and maintenance of additional levees to return the marshlands to the desired ecological balance. The navigational servitude claimed by Petitioners would prevent the Department from undertaking the necessary levee construction, and, consequently, unique wildlife habitat would decline along with natural food supplies so essential to support an abun-

dant wildlife and fish resource. Without habitat and adequate food supply, wildlife, fish, and other forms of aquatic life just disappear.

In more recent times, that is for more than fifteen (15) years, the Department has been waging a continuing battle with erosion of the levees and canal banks in its marshland canal systems. The full extent of the erosion problem and its cause, namely, wave action derived by boat traffic have been of great concern to Game and Fur Biologists because of the harmful effects to the environment of fur bearing animals and alligator populations.[1] To alleviate and reduce the environmental problems caused by erosion, the Department must continuously refurbish the levees lining its canal systems and construct new ones. The erosion problem and its harmful effects will be magnified and multiplied by the increased boat traffic which will follow the uncontrolled public access and use permitted by the Federal navigational servitude claimed by Petitioners. The Department in more recent times has not been able to prevent erosion, but merely slow its pace. With unlimited access and use by boat traffic, the battle to check erosion will be lost and there will follow a depletion of habitat with the accompanying reduction of wildlife and fish populations.

The practical needs and considerations of productive wildlife and aquatic management are grave policy concerns to the Louisiana Department of Wildlife & Fisheries as the custodian of Louisiana's plentiful renewable natural resources. The management activities described are the accumulation of marsh bottom experience gathered by many fish, game

1. "Erosion of Canal Banks on the Rockefeller Wildlife Refuge". Study of Louisiana Wildlife & Fisheries Commission (1961).

and fur biologists over many years.[2] Likewise, the adverse effects on habitat, food supply and wildlife and fish populations when these practices are permitted or followed for whatever reason is supported by this marsh bottom experience. [3] The unlimited public access and use which the Federal navigational servitude would impose will prevent the implementation of good management practices, which are presently followed on the private canal systems. The grave adverse effects on the wildlife, fish and aquatic life will certainly follow as night follows day.

It is readily apparent that good marshland management practice for the protection, conservation and replenishment of animal, fish, and other forms of aquatic life, which occupy these excellent habitat, run clearly into the teeth of the Federal navigational servitude sought by Petitioners, for the very tools employed in the management programs, i.e., restricted access and use of canals and habitat, employment of weirs, bulkheads, earthen plugs, and water impoundments, are the very obstacles the Federal navigational servitude in favor of the public cannot tolerate, i.e., restricted access and use by water course obstructions.

The Department suggests that under the facts of this case in view of the policy interest of the Department and the pri-

2. Wildlife Educational Bulletin No. 106, "The Fur Animals, the Alligator, and the Fur Industry in Louisiana.", Louisiana Wildlife & Fisheries Commission.

Hugh M. Burts & Chester W. Carpenter, "A Guide to Hunting in Louisiana--The Hunter's Paradise." Louisiana Wildlife Educational Pamphlet.

3. Ibid.

vate property owner militate against extending the Federal navigational servitude to Respondent's privately constructed course system upon its private lands.

CONCLUSION

There are no cogent needs or federal interest present warranting the promotion or protection of navigation on the waters of Respondent, the character of which are local in nature and entirely private. Accordingly, for the weighty reasons particularized in the brief of Vermilion Corporation, Respondent, and in some part for the additional reasons that law must be responsive to practical needs and considerations, which are in the nature of policy, this Court should affirm the Louisiana Courts for their judgment is correct as a matter of law.

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